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No. 05-259

IN THE

Supreme Court of the United States

BURLINGTON NORTHERN SANTA FE RAILWAY CO.,
Petitioner,

v.

SHEILA WHITE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an employer may be held liable for retaliatory discrimination under Title VII for any "*materially adverse change* in the terms of employment" (including a temporary suspension rescinded by the employer with full back pay or an inconvenient reassignment, as the court below held); for any adverse treatment that was "reasonably likely to deter" the plaintiff from engaging in protected activity (as the Ninth Circuit holds); or only for an "*ultimate* employment decision" (as two other courts of appeals hold).

2. Whether a plaintiff, whose evidence on liability is deemed sufficient by a court of appeals, is permitted a stand-alone retrial on punitive damages under a mere preponderance-of-the-evidence standard, rather than a clear-and-convincing-evidence standard.

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

RULE 29.6 STATEMENT

BNSF Railway Company ("BNSF"), formerly known as Burlington Northern Santa Fe Railway Co., is a wholly owned subsidiary of Burlington Northern Santa Fe Corporation. No publicly held company owns 10% or more of the stock of Burlington Northern Santa Fe Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner BNSF respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The order of the United States District Court for the Western District of Tennessee, in which it denied BNSF's motion for judgment as a matter of law or a new trial, is unreported, and is reproduced in the Appendix to this Petition ("Pet. App.") at 116a-122a. The initial decision of the Sixth Circuit is reported at 310 F.3d 443 (6th Cir. 2002), and is reproduced at Pet. App. 84a-115a. The Sixth Circuit granted rehearing en banc in an order that is reported at 321 F.3d 1203 (6th Cir. 2003), and reproduced at Pet. App. 123a-124a. The en banc decision of the Sixth Circuit—which is the judgment under review here—is published at 364 F.3d 789 (6th Cir. 2004), and is reproduced at Pet. App. 1a-83a. Following the decision of the Sixth Circuit sitting en banc, that court denied a petition for further rehearing en banc, in an unpublished order that is reproduced at Pet. App. 125a-126a.

JURISDICTION

The court of appeals, sitting en banc, entered judgment on April 14, 2004, Pet. App. 1a, and denied further rehearing en banc on April 26, 2005, *id.* at 125a-126a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). On July 20, 2005, Justice Stevens extended the time for filing a petition in this case to and including August 24, 2005.

STATUTES OR OTHER PROVISIONS INVOLVED

42 U.S.C. § 2000e-3(a) provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees

> or applicants for employment, ..., because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. 1981a(b)(1) provides in relevant part:

> A complaining party may recover punitive damages under this section against a respondent ... if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

STATEMENT

The decision below is only the latest manifestation of a mature, broad conflict among the courts of appeals on a critical issue of federal employment discrimination law—namely, what acts suffice to create employer liability under Title VII's anti-retaliation provision. On this issue, the lower courts are in disarray. All twelve regional courts of appeals have addressed the issue, and the result is three different legal standards that often lead to fundamentally different results in similar cases. Indeed, conflicts attend numerous aspects of the inquiry into adverse employment actions, including whether and when job reassignments and temporary suspensions with no tangible loss are actionable. These multiple, well-acknowledged and interrelated conflicts on a fundamental issue of federal employment law require this Court's review.

The importance of these conflicts is heightened in this case by the overlay of mistaken rulings on critical issues of punitive damages. In the decision below, a severely divided en banc court of appeals held by an 8-5 vote that the evidentiary burden on a plaintiff seeking punitive damages under Title

VII is only a preponderance of the evidence. That ruling is contrary to this Court's repeated statements that extraordinary sanctions require a higher burden of proof and it is, furthermore, contrary to the overwhelming trend in the States both at the time of the statute's enactment and today. What is more, the court ordered remand for a retrial on punitive damages alone—a procedure that violates the Seventh Amendment and conflicts with the precedents of this Court and the Fifth Circuit concerning partial retrials. This case, in short, presents an excellent vehicle for this Court to resolve disarray in the lower courts and to answer important questions concerning the interpretation of Title VII and the proper administration of punitive damages. The petition should be granted.

I. STATUTORY BACKGROUND

1. Section 704 of Title VII of the Civil Rights Act of 1964 prohibits retaliatory discrimination. Specifically, it forbids an employer from discriminating against an employee because she opposes unlawful employment practices, or because she "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). The purpose of this provision is simple: to "[m]aintain[] unfettered access to statutory remedial mechanisms." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997).

It is well established that, in order to prove unlawful retaliation, a plaintiff must demonstrate (1) that she engaged in protected conduct (specifically, the "oppos[ition]" or "partici-pat[ion]" referred to in § 704(a)); (2) that the employer took an "adverse employment action" against the plaintiff; and (3) that the adverse action was taken because of the protected conduct. 1 Barbara Lindeman & Paul Grossman, *Employment Discrimination Law* 672 & n.169 (3d ed. 1997).

The second of these requirements—that the employer must have taken adverse action against the plaintiff—is the subject of massive confusion in the lower courts and is implicated by

the first question presented. Although it is settled that some adverse action is necessary to prove an employer's liability for retaliation,[1] this Court never has defined what constitutes an "adverse employment action," and the courts of appeals have interpreted that term in inconsistent ways.

2. Once liability has attached under the anti-retaliation provision, then punitive damages are available if the plaintiff can show that the employer "engaged in unlawful intentional discrimination," 42 U.S.C. § 1981a(a)(1), and did so "with malice or with reckless indifference to the federally protected rights of an aggrieved individual," *id.* § 1981a(b)(1). But the statute is silent as to the plaintiff's burden of proof: *i.e.*, whether the plaintiff must prove malice or reckless indifference by a preponderance of the evidence, or by clear and convincing evidence. That is the core of the second question presented.

II. FACTUAL AND PROCEDURAL BACKGROUND[2]

1. Plaintiff Sheila White was a maintenance-of-way employee at BNSF's Tennessee Yard in Memphis. Pet. App. 3a. She was the only woman working in the yard at the time. *Id.* She testified that in her role as track laborer, she spent a majority of her time working outside in the rail yard, I Trial Tr. 99, and the remainder working on a forklift (although elsewhere she testified that she spent a majority of her time on the forklift and a "good bit" of her time on other maintenance-of-way duties, see II Trial Tr. 194-96).

On September 16, 1997, White complained that she was the victim of harassing conduct by her immediate supervisor, Bill

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[1] *See, e.g.*, Pet. App. 11a-12a & n.2 (describing the origin of the "adverse employment action" requirement); *cf. Clark County Sch. Dist.* v. *Breeden*, 532 U.S. 268, 269, 273 (2001) (per curiam) (referring to alleged "adverse employment actions" taken against a plaintiff).

[2] Although there was conflicting testimony on certain points, the following account construes the evidence in favor of White as the prevailing party.

Joiner, and others as a consequence of her gender. After investigation, BNSF suspended Joiner without pay for ten days and ordered him to attend a program on preventing sexual harassment. Pet. App. 4a.

On September 26, 1997, the roadmaster of the Tennessee Yard, Marvin Brown, informed White of the disciplinary action taken against Joiner, but also informed her that in the course of the investigation the company had discovered that men in the yard believed that she had been unfairly assigned forklift operator duties, which are less "arduous" and "cleaner" than other track-laborer work, even though other employees had greater seniority. Pet. App. 4a-5a. Brown removed White's forklift responsibilities, and that duty was then performed by an employee with greater seniority. *Id.*

In response, on October 10, 1997, White filed a charge with the EEOC alleging sex discrimination and retaliation. Pet. App. 5a. The former charge was based on the original actions by Joiner, and the latter on White's reassignment off the forklift. On December 4, 1997, White filed a second charge alleging that Brown had placed her on increased surveillance. *Id.* That charge was mailed to Brown on December 8, 1997. Three days later, White was involved in a dispute with another employee, and Brown suspended her without pay for insubordination. *Id.* at 5a-6a. Under the applicable collective bargaining agreement, White had 15 days within which to file a grievance to contest the disciplinary action, *id.* at 6a-7a, which she did. Prior to the formal hearing, the superintendent of BNSF's Tennessee territory met with the union representatives in the first stage of the grievance procedure, and reversed the suspension, reinstating White to service with full back pay, which covered the 37 days she was suspended. *Id.* at 7a.

2. After exhausting her administrative remedies with the EEOC, White filed suit against BNSF in the United States District Court for the Western District of Tennessee, alleging sex discrimination and retaliation. Pet. App. 7a. White pre-

sented two alternative theories of retaliation: that Brown retaliated against her for filing an internal complaint against Joiner when he removed her from forklift duty in September 1997, and that after the filing of the EEOC charges Brown retaliated against her by suspending her without pay. Pet. App. 118a-119a.

The case was tried to a jury, which found for BNSF on the underlying sex discrimination claim but entered a verdict in favor of White on the retaliation claim. Pet. App. 7a. The jury awarded $43,000 in compensatory damages and concluded—employing the clear-and-convincing-evidence standard of proof set forth in the jury instruction—that White was not entitled to punitive damages. *Id.* at 7a, 28a. The district court denied BNSF's motion for a judgment as a matter of law, *id.* at 7a, and both sides appealed—BNSF on the retaliation verdict, and White on the standard of proof for punitive damages used in the jury instruction.

3. A divided three-judge panel of the Sixth Circuit ruled that the judgment against BNSF should be reversed because there was no adverse employment action as required for a retaliation claim under Title VII. Pet. App. 85a. It noted that White suffered no loss of job title, and no diminution of salary, wages or benefits. *Id.* at 95a. That the work as a track laborer (rather than as a forklift operator) may have been more physically demanding was immaterial; BNSF "hired White as a track maintenance worker," and "[o]ne of her explicit job responsibilities was to maintain the railroad tracks." Accordingly, the panel held, "[w]e fail to see how White suffered an adverse employment action by being directed to do a job duty for which Burlington Northern hired her." *Id.* at 96a. Nor, the panel held, was White's temporary suspension (followed by subsequent reinstatement with backpay) an adverse employment action. Temporary suspensions, it held, are not sufficiently final to be actionable, and it noted that this suspension "was only an interim decision." *Id.* at 101a. Because

the panel held that there was no retaliation, it did not address punitive damages. *Id.* at 103a.

The court of appeals reheard the case en banc. In analyzing the standard for proving retaliation, the court acknowledged the entrenched three-way conflict among the federal courts of appeals as to the proper standard for analyzing adverse employment actions. It noted that in the Fifth and Eighth Circuits, intermediate employment decisions such as those involved in this case do not suffice, because the employer's action must be an "'*ultimate* employment decision.'" Pet. App. 21a (emphasis added). The court, however, "reject[ed] the 'ultimate employment decision' standard" as too limiting. *Id.* (emphasis added); see also *id.* at 22a-24a.

It also expressly "reject[ed]" the Ninth Circuit's adoption of the broad EEOC standard, Pet. App. 18a, that discrimination consists of any adverse retaliatory treatment that is "reasonably likely to deter" the affected person from engaging in protected activity. *Id.* at 15a-18a. Instead, it held (as other circuits likewise have done) "that a plaintiff ... must show that she suffered 'a materially adverse change in the terms of her employment,'" *id.* at 13a, but (contradicting the panel's application of that standard) determined that both the reassignment of White to other duties within her job description, as well as the temporary suspension, were sufficient to trigger employer liability for retaliation under Title VII. *Id.* at 19a-25a.

On White's cross-appeal, the court split 8-5 on the proper standard of proof for awarding punitive damages in a Title VII case. Title VII authorizes punitive damages when a defendant discriminates intentionally and "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(a)(1), (b)(1). The court divided over how to interpret Congress's silence regarding the requisite standard of proof. The majority held that the district court had erred in requiring White to put forward clear and convincing evidence that she was entitled to punitive

damages; rather, it held, the appropriate standard is a mere preponderance. Pet. App. 28a; see generally *id.* at 29a-33a.

Judge Sutton dissented, joined by four other judges. Relying on this Court's precedents (which require clear-and-convincing proof when severe and stigmatizing consequences will be imposed, and which recognize the special consequences of punitive damages), Pet. App. 54a-56a, and the trend in the States (which overwhelmingly favors the higher standard), *id.* at 56a-57a, the dissent determined that "a punitive damages claim represents an unconventional form of relief, which deserves a heightened rather than a run-of-the-mill standard of proof," *id.* at 52a. Accordingly, the dissenters would have held that the district court was right to require clear and convincing proof.

Finally, the court remanded for a retrial on "punitive damages only." Pet. App. 34a. It failed to address whether the facts relevant to punitive damages are intertwined with facts concerning the underlying question of liability such that a partial remand is forbidden under this Court's precedents. It simply ordered a single-issue retrial. As a result, BNSF sought further rehearing en banc or, alternatively, a clarification from the en banc court. The court issued a short order declining to revisit the remand issue. Pet. App. 125a-126a.

REASONS FOR GRANTING THE PETITION

In the decision below, the Sixth Circuit improperly held that temporary employment actions that are corrected by senior management, and reassignment of duties within the same job, constitute discriminatory retaliation. It further concluded that punitive damages for such conduct may be awarded under a mere preponderance of the evidence, then improperly remanded for a partial trial on punitive damages only. Each of these related errors merits review. On the first issue, the appropriate standard for proving an adverse employment action has for some time been the source of "real and growing

disarray" in the federal courts of appeals. Rebecca Hanner White, *De Minimis Discrimination*, 47 Emory L.J. 1121, 1126 (1998). Twelve federal courts of appeals have weighed in on this issue, and the result is an intractable, well-acknowledged three-way circuit split on this fundamental issue of federal law. This Court's review is necessary to bring uniformity and certainty to this badly muddled area of law.

Second, review is necessary to resolve two related issues of punitive damages jurisprudence. The first is the proper standard of proof for an award of punitive damages under Title VII. The standard of proof is often outcome-determinative, and that is nowhere more true than in Title VII cases, where factual issues abound and questions of motive and intent are hotly disputed. This Court has stated that the clear-and-convincing standard is appropriate for extraordinary and stigmatizing sanctions, and likewise has made clear that punitive damages are unquestionably extraordinary. This critical issue, which divided the court of appeals 8-5, clearly merits review. The petition should also be granted to address the Sixth Circuit's holding that a partial remand for retrial on punitive damages alone is appropriate, which conflicts with rulings of both this Court and the Fifth Circuit. This Court has recognized for some 70 years that, under the Seventh Amendment and principles of fair trials, partial remands are inappropriate when multiple issues are intertwined. That is precisely the circumstance here, where the availability of punitive damages is inseparable from underlying issues of liability. The intractable conflict of authority on a critical issue of federal employment law is reason enough for certiorari to be granted; that it presents two extraordinarily important issues concerning punitive damages underscores the need for review.

I. REVIEW IS WARRANTED TO RESOLVE THE THREE-WAY CONFLICT, ENCOMPASSING TWELVE COURTS OF APPEALS, REGARDING THE ANTI-RETALIATION PROVISION OF TITLE VII.

A. Certiorari Is Needed To Resolve The Entrenched Conflict Of Authority.

The federal courts of appeals are badly divided over the proper standard for determining when an employer has engaged in retaliatory discrimination against an employee for purposes of Title VII. See, *e.g.*, 2 Lex K. Larson, *Employment Discrimination* § 34.04, at 34-47 (2d ed. 2005) ("Because no definition of 'discrimination' is provided in the statute ... courts disagree on which types of actions are prohibited by the Title VII anti-retaliation provision."). Numerous courts have acknowledged the circuit split, and in so doing, have made it abundantly clear that only review by this Court can bring order to this body of law. *E.g.*, Pet. App. 15a-19a, 21a; *Noviello* v. *City of Boston*, 398 F.3d 76, 89 (1st Cir. 2005); *Zaffuto* v. *City of Hammond*, 308 F.3d 485, 492 & n.7 (5th Cir.), *on reh'g*, 313 F.3d 879 (5th Cir. 2002) (per curiam); *Ray* v. *Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000); *Wideman* v. *Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998).

The chaos is such that courts and commentators even disagree about to how to characterize the various courts of appeals' positions within the circuit split. The Larson treatise concludes that there is a three-way split, with at least four circuits requiring a showing of a "'materially adverse change in the terms and conditions of employment'"; two circuits (the Fifth and Eighth) requiring a greater showing (specifically, an "'ultimate employment decision'"); and the Ninth Circuit setting the bar the lowest, by requiring the plaintiff to identify only an action that was "'reasonably likely to deter employees from engaging in protected activity.'" 2 Larson, *supra* § 34.04, at 34-48 to 34-53. The Ninth Circuit, however,

views the conflict differently, and paints itself as firmly in the majority. It describes itself as aligned with a majority of circuits "that define adverse employment action broadly." *Ray*, 217 F.3d at 1240. Like Larson, the Ninth Circuit characterizes the Fifth and Eighth Circuits as holding "[t]he most restrictive view." *Id.* But where Larson places the Second and Third Circuits in the majority, the Ninth Circuit characterizes those courts as holding only an "intermediate position." *Id.*

Then there is the decision below, which disagrees with the Ninth Circuit in every particular. The Sixth Circuit rejected the "ultimate employment decision" test adopted by the Fifth and Eighth Circuits, but unlike the Ninth Circuit, questioned whether the Fifth Circuit still adheres to the test and whether (at least in certain cases) the Eighth Circuit's application of the test was materially different from its own. Pet. App. 21a.[3] The court below, however, concluded that the Ninth Circuit—the only court to adopt the EEOC standard—is out on its own, and roundly rejected that court's approach, *id.* at 15a-19a. The depth and intractability of this conflict, and the extent of the confusion in the circuits, can be readily demonstrated from a detailed review of the relevant decisions of the courts of appeals.

1. Two circuits, the Fifth and Eighth, hold that in order to make out a claim for actionable retaliation, an employee must show that action taken by the employer was an "ultimate em-

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[3] The decision below wrongly suggests that the "ultimate employment decision" standard may no longer be valid in the Fifth Circuit, because a panel of that court in 2001 asked (but did not answer) whether that test had been superseded by this Court's decision in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998) (which is discussed *infra*). *See* Pet. App. 21a (citing *Fierros* v. *Texas Dep't of Health*, 274 F.3d 187, 192-93 & n.2 (5th Cir. 2001)). The Fifth Circuit, however, has in the years since *Ellerth*, repeatedly reaffirmed the validity of the "ultimate employment decision" test and declared its consistency with *Ellerth*. *See Brazoria County, Tex.* v. *EEOC*, 391 F.3d 685, 692-93 (5th Cir. 2004); *Hernandez* v. *Crawford Bldg. Material Co.*, 321 F.3d 528, 531 (5th Cir.) (per curiam), *cert. denied*, 540 U.S. 817 (2003); *Zaffuto*, 308 F.3d at 493.

ployment decision." *Brazoria County, Tex.* v. *EEOC*, 391 F.3d 685, 692-93 (5th Cir. 2004); *Mattern* v. *Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); *Ledergerber* v. *Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997). This test encompasses "acts 'such as hiring, granting leave, discharging, promoting, and compensating.'" *Mattern*, 104 F.3d at 707; see also *Von Gunten* v. *Maryland*, 243 F.3d 858, 864-65 (4th Cir. 2001) (the "'ultimate employment decision' standard .... involve[s] hiring, firing, refusal to promote, [and] the like"); cf. *Hockman* v. *Westward Communications, LLC*, 407 F.3d 317, 330-31 (5th Cir. 2004) (identifying employment decisions that are *not* "ultimate").

Although the nomenclature is different, the rule of the Fifth and Eighth Circuits comports with the "tangible employment action" standard that this Court announced in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998). See *Zaffuto*, 308 F.3d at 493 (relying on *Ellerth*). *Ellerth* addressed the vicarious liability of employers under section 703(a) of Title VII for sex discrimination by supervisors. Apart from claims of hostile work environment, 524 U.S. at 763, this Court held that on agency principles an employer is liable for "a tangible employment action," even when such actions reflect only personal animus, but not for lesser acts, *id.* at 762-63.

In reaching its conclusion, this Court defined the term "tangible employment action" as "*a significant change in employment status*, such as hiring, firing, failing to promote, *reassignment with significantly different responsibilities*, or a decision causing a significant change in benefits." *Id.* at 761 (emphases added). This Court emphasized that only "[t]angible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision *requires an official act of the enterprise, a company act.*" *Id.* at 762 (emphasis added); see also *Pennsylvania State Police* v. *Suders*, 124 S. Ct. 2342, 2353 (2004) (reaffirming this aspect of *Ellerth*). The Court further emphasized that liability is fairly

attributed to the employer because in rendering such tangible employment actions "[t]he supervisor often must obtain the imprimatur of the enterprise and use its internal processes." *Ellerth*, 524 U.S. at 762. It is thus clear that interim or minor actions of supervisory personnel that are not the ultimate "official act" of the company are not "tangible employment actions" under *Ellerth* and cannot result in liability.

Although the Sixth Circuit pledged fealty to *Ellerth* in announcing its standard and rejecting the rule of the Fifth and Eighth Circuits, Pet. App. 14a, it simply misread *Ellerth*, which excluded liability for just the types of activities alleged here to have been retaliatory. Indeed, this Court in *Ellerth* cited favorably lower-court cases that, in contradistinction to the decision below, recognized that a "demotion without change in pay, benefits, duties, or prestige [is] insufficient" to establish discrimination, as is "reassignment to [a] more inconvenient job." 524 U.S. at 761. Thus, the interim suspension without pay imposed by roadmaster Brown was not the end result of the company's "internal processes," *id.* at 762. The ultimate act of BNSF in this context was the superintendent's lifting of the suspension and his restoration to White of full pay for the period in which she did not work, which is hardly an act of retaliation. Nor does the roadmaster's relieving White of her forklift duties and assigning her to other tasks within her job classification—tasks that are no different from those performed by other, more senior maintenance-of-way employees, and that she already was devoting a substantial portion of her time to performing—constitute a tangible employment action sufficient to create employer liability. The manager's assignment of a worker to "[a] more inconvenient job" simply does not create employer liability. *Id.* at 761.

2. Prior to the en banc decision below, the Sixth Circuit's "adverse employment action" standard was consistent with the "ultimate employment decision" standard of the Fifth and Eighth Circuits, and BNSF would have prevailed under that

standard, as the initial Sixth Circuit panel in this case ruled. Pet. App. 93a-103a; *Kocsis v. Multicare Mgmt. Inc.*, 97 F.3d 876, 885, 886 (6th Cir. 1996) (holding that neither a "'mere inconvenience or an alteration of job responsibilities,'" nor a "'bruised ego'" is enough to constitute discrimination, and "reassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims"), *cited in Ellerth*, 524 U.S. at 761; *Dobbs-Weinstein* v. *Vanderbilt Univ.*, 185 F.3d 542, 545-46 (6th Cir. 1999) (an employment action—specifically, denial of tenure—is not an actionable adverse employment action when it is subject to further review).

Indeed, the decision below strongly signaled disapproval of *Dobbs-Weinstein*, see Pet. App. 19a-22a & n.7, which relied upon the "ultimate employment action" standard. And, although the decision below purported to rely on *Kocsis*, see, *e.g.*, Pet. App. 13a-14a, 18a, 25a, it simply is impossible to square *Kocsis* with the temporary suspension and reassignment without loss of pay that occurred here. By diluting the "adverse employment action" standard to reach interim suspensions rescinded with full back pay and reassignment to more inconvenient duties within an employee's job classification, the court below created a significant split with the Fifth and Eighth Circuits. Other courts of appeals have likewise expressly rejected the test adopted by the Fifth and Eighth Circuits. See *id.* at 21a; *Von Gunten*, 243 F.3d at 865 ("'ultimate employment decision' is not the standard in this circuit"); *Ray*, 217 F.3d at 1242; *Wideman*, 141 F.3d at 1456.

Nominally, the Sixth Circuit's standard—that an "adverse employment action" occurs when an employee is subjected to "'a materially adverse change in the terms of her employment,'" Pet. App. 13a—mirrors the standard adopted by eight other circuits.[4] In practice, however, it departs from decisions

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[4] *See Marrero* v. *Goya of P.R., Inc.*, 304 F.3d 7, 27, 29 (1st Cir. 2002) (requiring a showing that a transfer was "materially adverse"); *Fairbrother* v. *Morrison*, 412 F.3d 39, 56 (2d Cir. 2005) ("An adverse em-

of some of those courts that employ the same terminology of "materially adverse change." For instance, the Seventh Circuit has held that "a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities," and that a transfer to a new job with—as here—the same salary and benefits, and different but no less significant responsibilities, was not actionable. *Crady* v. *Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993).

As the Sixth Circuit acknowledged, the "ultimate employment decision" test would have led to a different result in this case. Pet. App. 22a. The court rejected the "'ultimate employment decision' standard" precisely because, on its view, "the employment action taken in the present case ... is not the type of employment action that this court developed the adverse-employment-action element to filter." *Id.* See also *Von Gunten*, 243 F.3d at 864-65 (holding that the "materially adverse change" standard protects against employer actions that the "ultimate employment decision" test does not).

3. Finally, the Ninth Circuit has yet another approach, all its own, for identifying when employer conduct is sufficiently serious to violate the anti-retaliation provision of Title VII. In *Ray*, that court adopted the standard suggested by the EEOC, and held that an "adverse employment action" is "'any adverse treatment that is based on a retaliatory motive and is

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ployment action is a "'materially adverse change" in the terms and conditions of employment.'"); *Mondzelewski* v. *Pathmark Stores, Inc.*, 162 F.3d 778, 787 (3d Cir. 1998) ("[c]ourts customarily ... [require] a retaliation plaintiff [to] show that he or she suffered a 'materially adverse employment action'"); *Von Gunten*, 243 F.3d at 865; *Ribando* v. *United Airlines, Inc.*, 200 F.3d 507, 510-11 (7th Cir. 1999) ("the adverse job action must be 'materially' adverse, meaning more than 'a mere inconvenience or an alteration of job responsibilities'"); *Medina* v. *Income Support Div., N.M.*, 413 F.3d 1131, 1136 (10th Cir. 2005); *Wilbur* v. *Correctional Servs. Corp.*, 393 F.3d 1192, 1202 n.5 (11th Cir. 2004); *Brown* v. *Brody*, 199 F.3d 446, 456 (D.C. Cir. 1999).

reasonably likely to deter the charging party or others from engaging in protected activity.'" 217 F.3d at 1242-43.

It is widely recognized that the Ninth Circuit's standard differs from and conflicts with the two standards set forth above, notwithstanding that court's assertions to the contrary, see *id.* at 1240, 1241, 1243. In the decision below, for instance, the majority expressly recognized that the Ninth Circuit's test differs from the "materially adverse change" test that it adopted, Pet. App. 15a, and rejected that test, *id.* at 18a; see also *id.* at 35a (Clay, J., concurring) (recognizing the distinction between the Ninth Circuit's test and the one adopted by the en banc majority; advocating adoption of the Ninth Circuit standard). The Ninth Circuit, for its part, rejected the test of the Fifth and Eighth Circuits. See *Ray*, 217 F.3d at 1242. Other courts similarly have recognized the difference between the tests. *E.g.*, *Sanders* v. *New York City Human Res. Admin.*, 361 F.3d 749, 756 (2d Cir. 2004); *Von Gunten*, 243 F.3d at 863 n.1 (rejecting the EEOC's "reasonably likely to deter" test).

4. The result of this confusion among the circuits is that the happenstance of where a case is litigated regularly determines its outcome. That is surely true in this case. The Sixth Circuit determined that when White was suspended without pay (a determination reversed through internal grievance processes one month later, and backpay given), and when she was transferred to a new job that purportedly was "more arduous and 'dirtier,'" she was subjected to materially adverse changes in her employment. Pet. App. 19a-25a.

Because these actions were not "ultimate employment decisions," however, they would not have been actionable in the Fifth and Eighth Circuits. They are not "ultimate" in the sense that they do not rise to the level of seriousness that those courts require—in contrast, for instance, to hiring and firing—and the temporary suspension without pay is not "ultimate" in the sense that it is not the official act of the company regarding her employment status, as evidenced by the

fact that White was reinstated and given backpay by the superintendent. See, *e.g.*, *Okruhlik* v. *University of Ark.*, 395 F.3d 872, 880-81 (8th Cir. 2005) (where denial of tenure was not fully finalized because the plaintiff failed to seek full internal review, there was no "adverse employment action"); *Saulsberry* v. *St. Mary's Univ.*, 318 F.3d 862, 868 (8th Cir. 2003) (temporary employment actions are not actionable); *Brazoria County*, 391 F.3d at 692-93; *Hernandez*, 321 F.3d at 531-33; *Zaffuto*, 308 F.3d at 493-94.[5]

B. Certiorari Also Should Be Granted Because The Issue Is Important And Recurring.

1. The depth of the circuit split set forth above, and the breadth of the confusion that attends it, are ample reason for this Court to grant the petition. The need for review is all the more compelling because this issue arises repeatedly, both in the specific context of Title VII and in closely related statutes.

First, this issue arises with great frequency. Were that not apparent from the fact that every regional court of appeals has weighed in on the issue, it is confirmed by even the briefest review of the annotated United States Code, which lists hundreds of cases related to 42 U.S.C. § 2000e-3(a) under the heading of "retaliatory acts." Indeed, in fiscal year 2004 alone, more than 20,000 charges of retaliatory discrimination under Title VII were filed with the EEOC, and the trend is strongly upward—this is twice as many retaliation charges as were filed in 1992. See EEOC, Charge Statistics FY 1992 Through FY 2004, *at* http://www.eeoc.gov/stats/charges.html (last modified Jan. 27, 2005). The volume of these cases provides a compelling reason for this Court to intervene to pro-

[5] In this regard, moreover, the decision below further conflicts with at least four other circuits that hold that an otherwise adverse employment action that has been cured is not a proper basis for a Title VII retaliation suit. *See Taylor* v. *Small*, 350 F.3d 1286, 1293-94 (D.C. Cir. 2003) (citing cases from the Fifth, Ninth and Eleventh Circuits, as well as the opinion of the three-judge panel in this case).

vide the uniformity, certainty and stability that are necessary in this heavily litigated body of law. The lower courts have had ample opportunity to resolve their differences, and their failure to do so indicates that no such resolution will occur absent this Court's involvement. In the meantime, numerous cases will be decided according to divergent standards until this Court clarifies the law.

What is more, the confusion in this aspect of Title VII has spawned analogous disarray in the numerous federal statutes that contain similar anti-retaliation provisions. Such prohibitions appear in, among other statutes, the Americans with Disabilities Act (ADA), 42 U.S.C. § 12203; the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(d); the Equal Pay Act, *id.* § 215(a)(3); the Family and Medical Leave Act, *id.* § 2615; and the False Claims and Major Fraud Act, 31 U.S.C. § 3730(h); and similar principles govern retaliatory discharge in violation of the First Amendment, see *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968).

Given the maxim that similar provisions in similar statutes should be interpreted *in pari materia*, see 2B Norman J. Singer, *Sutherland on Statutory Construction* § 51.02, at 176-78 (6th ed. 2000)—a principle that applies to antidiscrimination statutes[6]—it was inevitable that the multiple, inconsistent tests under Title VII would spill over into related areas of the law, and this is precisely what has happened. Courts interpreting anti-retaliation provisions of other statutes rely upon cases interpreting the anti-retaliation provision of Title VII. In so doing, the same divisions of authority set forth above have been introduced into those related statutes. *E.g.*, *Shotz* v. *City of Plantation, Fla.*, 344 F.3d 1161, 1180-82 (11th Cir. 2003) (in an ADA case, importing the materiality standard

[6] *See, e.g.*, *Brown*, 199 F.3d at 456 n.10 ("Courts of appeals routinely apply the same standards to evaluate Title VII claims as they do ADA claims, ADEA claims, and even ERISA claims.... For the same reason, courts rely on cases applying like-worded retaliation provisions in different statutes." (citations omitted)).

from Title VII case law); *Moore* v. *California Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 847-48 (9th Cir. 2002) (in a False Claims Act case, citing *Ray*, and importing the Ninth Circuit's "reasonably likely to deter standard").

That the state of the law within Title VII itself is in disarray is reason enough for this Court to grant certiorari; that those problems are radiating out into other related areas of the law reinforces the need for this Court's review.

2. Review is particularly important because of the ramifications of the Sixth Circuit's decision that temporary suspensions without pay and assignments to less convenient duties are actionable as retaliation under Title VII. The ruling below will jeopardize legitimate employer practices by the imposition of unwarranted and unpredictable litigation risk.

In *Ellerth*, this Court recognized that Congress, in Title VII, favored a policy of "conciliation rather than litigation." 524 U.S. at 764. But a rule that a temporary, reversible unpaid suspension is actionable retaliation would subvert this goal by undermining the grievance process that stands in the stead of litigation. That grievance mechanism is the process by which companies like BNSF rectify their supervisors' mistakes—mistakes that are inevitable in a decentralized company where line management must take immediate action. See *id.* ("Title VII is designed to encourage the creation of ... effective grievance mechanisms.").

Employers must have the latitude to allow line management to suspend employees from service immediately for insubordination or other types of misconduct—including, for example, drug or alcohol abuse, violation of safety or work rules, and embezzlement or theft. Insubordination is particularly intolerable in the railroad context, where clear observance of lines of authority is critical to both the safety and efficiency of operations. Under the Sixth Circuit's ruling, employers cannot undertake such workplace control measures without incurring substantial litigation risk if the employee has previ-

ously filed discrimination complaints or charges from legitimate suspensions, or has been a witness or otherwise participated in a Title VII proceeding. Because litigation risk and cost is substantial even when retaliation claims are meritless, the net result is deterrence of legitimate suspensions of employees engaging in misconduct.

The Sixth Circuit suggests that employers may still safely suspend employees so long as they do so *with pay*. Pet. App. 24a. But that is no solution at all, because it systematically and unfairly places employers at substantial economic disadvantage in the usual case when the suspension is legitimate. The reason is that if the employer must continue to pay a suspended employee for periods when the employee does not work, the employer will have no practical recourse for recovering the money if the suspension is upheld and the employee is ultimately terminated. In many circumstances, employees will have spent their wage checks and will be effectively judgment-proof. Employers who may only avoid retaliation litigation by paying suspended employees their full, unrecoverable wages for work not performed will be deterred from suspending many employees even if the employee's misconduct clearly warrants the suspension. Nothing in Title VII compels such an aberrant and detrimental result that is contrary to sound business practice.

Moreover, extending Title VII liability to trivial actions such as reassigning an employee to duties within his or her job description that are less appealing (but no different from those performed by other workers in the same job classification or, as here, by the same worker for part of the time) means as a practical matter that a Title VII complainant or witness cannot be subject to normal supervision and direction by management. Retaliatory motive is almost always a matter of jury inference, and thus any supervisory action that is arguably adverse can become the basis of litigation. To avoid litigation risk, an employer and its managerial employees have little option but to treat such employees with kid gloves,

ensuring that any reassignment of duties is inarguably neutral or preferential. This is exactly the wasteful result that this Court in *Ellerth* and courts of appeals adhering to a more stringent standard of retaliation liability have sought to prevent. Furthermore, a temporary suspension without pay that is timely corrected by senior management is not on the whole unjust to the employee whose suspension was improper and retaliatory. Although there may be some hardship during the pendency of the proceeding, a vindicated employee will end up receiving full pay for periods in which, after all, he or she did not have to work.

All of these considerations support the notion that minor and interim employment actions should not be actionable retaliation. A contrary rule will make it impossible for employers ever to take such actions without the specter of litigation. At a minimum, they underscore the immediate importance of this Court's review of a critical Title VII issue on which the lower courts are badly divided.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW ERRONEOUSLY PERMITS PUNITIVE DAMAGES TO BE AWARDED UPON PROOF BY A MERE PREPONDERANCE OF THE EVIDENCE.

1. This Court should additionally grant the petition to consider the important federal question of what standard of proof is borne by a plaintiff who seeks punitive damages under Title VII, which divided the en banc Sixth Circuit 8-5. That statute permits punitive damages if the plaintiff shows that the employer acted intentionally, and "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(a)(1), (b)(1). The statute does not, however, specify a standard of proof, and this statutory gap led to error below. The court below mistakenly held that a plaintiff may receive extraordinary relief in the form of punitive damages upon proof by a mere prepon-

derance of the evidence. Pet. App. 28a. It is true, to be sure, that "[c]onventional rules of civil litigation" apply when "conventional relief" is at issue. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 253 (1989) (plurality). But, conversely, *non*conventional sanctions—i.e., those that impose special burdens or special stigma—are subject to a heightened standard of proof. Punitive damages are not merely nonconventional, but indeed are quasi-criminal. *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 416 (2003). When Congress has not specified a burden of proof, it is this Court's job to "prescribe the standard," *Steadman* v. *SEC*, 450 U.S. 91, 95 (1981); *Woodby* v. *INS*, 385 U.S. 276, 284 (1966), and the petition should be granted to resolve this critical question of federal law.

The standard of review that attends proof under a given statute is an issue of surpassing importance. As this Court has explained:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Addington v. *Texas*, 441 U.S. 418, 423 (1979) (citation omitted).

For precisely these reasons, when a statute imposes extraordinary sanctions—such as the punitive damages remedy available under Title VII—and Congress has not specified the movant's burden of proof, clear and convincing proof is required. As Judge Sutton correctly noted in his dissent, Pet. App. 54a-56a, this Court has recognized the use of the clear-and-convincing burden "in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defen-

dant," *Addington*, 441 U.S. at 424. It has cited approvingly the heightened burden of proof that attends cases involving civil fraud, adultery, illegitimacy, lost wills and oral contracts. *Woodby*, 385 U.S. at 285 n.18. And it has imposed the clear-and-convincing burden in the contexts of deportation, *id.* at 285, and denationalization, *Nishikawa* v. *Dulles*, 356 U.S. 129, 134-35 (1958), among others.

As Judge Sutton pointed out, the punitive damages remedy falls squarely within these boundaries. *Addington* recognizes that clear and convincing proof commonly is required for "quasi-criminal wrongdoing," 441 U.S. at 424, and that is exactly how this Court has characterized punitive damages. See Pet. App. 55a-56a (Sutton, J., dissenting). Punitive damages "serve the same purposes as criminal penalties"—namely, "deterrence and retribution." *State Farm*, 538 U.S. at 416, 417; *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 568 (1996); *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 287 (1989) (O'Connor, J., concurring in part and dissenting in part). Such damages differ markedly from traditional compensatory relief, the purpose of which is "'to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.'" *State Farm*, 538 U.S. at 416; *Cooper Indus., Inc.*, v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). Because punitive damages are designed to punish reprehensible conduct, *State Farm*, 538 U.S. at 418-19; *Gore*, 517 U.S. at 575, and because such damages impose a special stigma upon a defendant, they require special procedural protections.[7] It is under just such circumstances that this Court has recognized the clear-and-

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[7] *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting) ("[P]unitive damages are quasi-criminal punishment. Unlike compensatory damages ... punitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible. Hence, there is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award.").

convincing standard to be appropriate. *Addington*, 441 U.S. at 424; see *supra* at 22.

Indeed, this Court has expressed concern about the fact that punitive damages are quasi-criminal in nature but unaccompanied by the usual criminal procedural protections. *E.g.*, *State Farm*, 538 U.S. at 417. To that end, it has expressly endorsed the application of the clear-and-convincing standard to punitive damages awards: "There is much to be said in favor of a State's requiring ... a standard of 'clear and convincing evidence' or, even, 'beyond a reasonable doubt,' as in the criminal context." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 23 n.11 (1991) (citations omitted).

Not only is the decision below flatly incompatible with this Court's precedents; it is also contrary to the overwhelming trend in the States. As the Sixth Circuit dissenters recognized, when § 1981a was enacted in 1991, 21 of 29 States to have considered the issue required proof of punitive damages by at least clear and convincing evidence in all cases, and two more States required it in certain cases. Pet. App. 62a-65a (Sutton, J., dissenting). The strength of that trend is clear from where the States stand now: Today, 31 of the 34 States to have considered the question require a heightened standard. *Id.* at 73a-77a. This is of no small concern; this Court has looked to state standards of review in seeking to identify federal standards. *Addington*, 441 U.S. at 431-32. Moreover, both the American Bar Association and the American Law Institute have recommended the clear-and-convincing standard for punitive damages. See Special Comm. on Punitive Damages, *Punitive Damages: A Constructive Examination*, 1986 A.B.A. Sec. Litig. 33; 2 American Law Inst., *Reporters' Study: Enterprise Responsibility for Personal Injury* 264 (1991). Important for purposes of interpreting the statute, both the ABA and ALI recommendations preceded the enactment of § 1981a. There is no warrant for the Sixth Circuit's claim that congressional silence should be treated as adopting an archaic rule allowing punitive damages to be

awarded on a mere preponderance of the evidence. See Pet. App. 28a.

2. The decision to authorize the plaintiff to receive extraordinary relief upon a meager standard of proof was error enough to merit this Court's review, but this mistake was badly compounded by the remedial order—that the district court should "conduct a new trial on the issue of punitive damages *only*." Pet. App. 34a (emphasis added); see also *id.* 125a-126a (reaffirming this ruling). That ruling conflicts with precedents of both this Court and the Fifth Circuit.

The decision to remand for a retrial solely on punitive damages cannot be reconciled with this Court's decision in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931). There, the Court considered the circumstances under which the Seventh Amendment permits a partial retrial on only certain issues. Specifically, it addressed whether a retrial on damages also required a retrial of the underlying counterclaim. *Id.* at 499. In so doing, the Court held that "a partial new trial ... may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* at 500. And, it concluded in that case that "the question of damages ... is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Id.*

The Fifth Circuit, similarly, has properly recognized the close relationship between liability and punitive damages in Title VII cases, and accordingly has refused to permit the sort of limited remand that was ordered here. In *Hardin* v. *Caterpillar, Inc.*, it declined to permit a retrial on punitive damages only, because a "jury's decision on the claim of punitive damages [is] intertwined with its view of the facts determin-

ing liability." 227 F.3d 268, 272 (5th Cir. 2000).[8] That analysis is consistent with *Gasoline Products*, and in this regard, it too conflicts with the decision below, providing yet one more reason that certiorari should be granted.

The implications of this rule in the Title VII context are clear: a partial retrial on punitive damages alone is impermissible because the evaluation of whether any punitive damages are warranted is inseparably intertwined with underlying issues of liability. A jury considering the propriety of a punitive damage award in a Title VII case must consider whether the defendant can show that the employer "engaged in unlawful intentional discrimination," 42 U.S.C. § 1981a(a)(1), and did so "with malice or with reckless indifference to the federally protected rights of an aggrieved individual," *id.* § 1981a(b)(1). This standard requires proof of "'conscious wrongdoing,'" such that "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 536, 538 (1999) (internal quotation marks omitted). The factual questions of conduct and the defendant's "state of mind" in engaging in that conduct, *id.* at 535, are inseparable and cannot be split between two juries, for it would be impossible for a second jury assessing state of mind to know precisely what facts concerning conduct were found by the first jury. Accordingly, to resubmit conduct-related facts to a new jury to decide anew on remand is to invite an unlawful reexamination of the facts underlying the original jury's verdict.

The Sixth Circuit, however, did not apply the *Gasoline Products* test even though a stand-alone trial is clearly inap-

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[8] *Accord* 227 F.3d at 272 ("A jury deciding whether to award punitive damages and their amount responds to the evidence of intentional acts essential here to the underlying finding of liability."); *see also Western Fireproofing Co.* v. *W.R. Grace & Co.*, 896 F.2d 286, 293-94 (8th Cir. 1990) (requiring a full remand in a fraud case because of the close connection between liability and punitive damages).

propriate. Indeed, although punitive damages are almost always intertwined with a determination of liability because they rest on jury findings regarding the defendant's conduct, see *State Farm*, 538 U.S. at 419; *Kolstad*, 527 U.S. at 535-38, that is particularly so in this instance, where the plaintiff presented alternative theories of liability to the jury on retaliation, but no interrogatories were submitted to determine on which ground the verdict rested. Under the Sixth Circuit's standard, the jury verdict on retaliation could have rested on either the suspension *or* the reassignment of White from forklift duty, but there is no basis for knowing which facts the jury found. Thus, the second jury in a standalone punitive damages retrial cannot be instructed as to which conduct attributable to BNSF it should evaluate for malice or reckless indifference. There is thus a substantial risk of inconsistent jury verdicts; the second jury may punish BNSF for conduct that was not the basis of its retaliation liability in the first trial. If White desires a new trial because of error in the punitive damages instruction, the only proper and just result under *Gasoline Products* is for the court of appeals to grant a complete new trial.

* * * *

The decision below exacerbates a three-way, 12-circuit conflict of authority that cries out for this Court's intervention. There is no possibility that the conflict will be resolved in the lower courts, and in the meantime, it has spread uncertainty and confusion into related areas of law. The decision below, moreover, errs as to two critical questions concerning the proper application of punitive damages. For all of these reasons, this case is an excellent vehicle for bringing much-needed certainty to multiple areas of federal law under Title VII that affect core primary conduct of employers and thus warrant uniform rules of law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 00-6780, 01-5024

SHEILA WHITE,
Plaintiff-Appellee/Cross-Appellant,

v.

BURLINGTON NORTHERN & SANTA FE RAILWAY CO.,
Defendant-Appellant/Cross-Appellee.

Argued June 11, 2003.
Decided and Filed April 14, 2004.

Before: BOGGS, *Chief Judge*; MARTIN, KRUPANSKY, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, and COOK, *Circuit Judges*.

GIBBONS, J., announced the judgment and majority opinion of the en banc court on all issues. The entire en banc court joined Parts I (Background) and III (Attorney's Fees) of the majority opinion. Part II (Adverse Employment Action) of the majority opinion was joined by BOGGS, C. J., and KRUPANSKY, BATCHELDER, GILMAN, ROGERS, SUTTON, and COOK, JJ., and Part IV (Punitive Damages) was joined by MARTIN, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, and COOK, JJ. CLAY, J. (pp. 808-17), filed a separate concurring opinion joining Parts I, III, and IV of the majority opinion and writing separately as to Parts II and V, in which he was joined by MARTIN, DAUGHTREY, MOORE, and COLE, JJ. SUTTON, J. (pp. 817-42), filed an

opinion concurring in Parts I-III and dissenting from Parts IV and V, in which he was joined by BOGGS, C. J., and KRUPANSKY, BATCHELDER, and ROGERS, JJ.

GIBBONS, *Circuit Judge.*

In this appeal, the *en banc* court addresses the meaning of "adverse employment action" for purposes of Title VII. We decide that a thirty-seven day suspension without pay constitutes an adverse employment action regardless of whether the suspension is followed by a reinstatement with back pay. We also address several other issues raised by this appeal.

Sheila White brought this action against her employer, Burlington Northern & Santa Fe Railway Company (Burlington Northern), alleging sex discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3. The jury returned a verdict in favor of Burlington Northern on the sex discrimination claim and in favor of White on the retaliation claim. The jury awarded White compensatory damages but no punitive damages. After the trial, the district court denied Burlington Northern's motion for judgment as a matter of law on the retaliation claim and granted White's motion for attorney's fees.

Burlington Northern appeals from the denial of its motion for judgment as a matter of law and from the award of attorney's fees to White. White cross-appeals, challenging the district court's jury instruction regarding punitive damages. For the reasons set forth below, we affirm the district court's denial of Burlington Northern's motion for judgment as a matter of law and the district court's award of attorney's fees to White. We conclude, however, that the district court erred in instructing the jury on the issue of punitive damages, and therefore we remand the case for further proceedings consistent with this opinion.

I. BACKGROUND

Before June 1997, Ralph Ellis operated the stationary forklift for Burlington Northern at its Tennessee Yard in Memphis. In June 1997, Ellis resigned from the forklift position in order to work on a mobile track gang, in which position Ellis earned more pay than he would have if he had continued working in the forklift position. Marvin Brown, roadmaster of the Tennessee Yard, interviewed White for a job with Burlington Northern and expressed interest in White's experience operating a forklift. On June 23, 1997, Burlington Northern hired White to work in its Maintenance of Way department at its Tennessee Yard, and following White's hire, Brown assigned her to operate the forklift at the Tennessee Yard.

White was the only female working in the Maintenance of Way department at the Tennessee Yard. White's immediate supervisor was foreman Bill Joiner. Joiner had never supervised a woman before, and he admitted at trial that he treated White differently because of her gender. He also admitted that he did not believe that the Maintenance of Way department was an appropriate place for women to work. According to White, Joiner repeatedly expressed this belief to her while she was working under his supervision. According to Joiner, several other Burlington Northern employees also expressed the belief that women should not work on a railroad. Another Burlington Northern employee agreed at trial that there was "a general anti-woman feeling" among Burlington Northern employees at the Tennessee Yard.

Despite concerns about the propriety of a woman working on the railroad, the evidence was uncontradicted that White did not have difficulty performing her job. According to Brown, he never received a complaint regarding White's performance operating the forklift. Joiner testified that White had no problems performing her job. Furthermore, another Burlington Northern foreman testified that no one expressed

concern about White's ability to get along well with others in the workplace or about anything specific to White other than her gender.

On September 16, 1997, White complained to Brown and other company officials about specific incidents of alleged sexual harassment committed by Joiner. The company investigated. Following the investigation, Burlington Northern suspended Joiner for ten days and ordered him to attend a training session regarding sexual harassment.

On September 26, 1997, Brown met with White to inform her that Joiner had been disciplined pursuant to her complaint. He also, however, told her that the company had learned during the investigation of several complaints about her working in the forklift position. According to Brown, the complaints did not relate to her performance but related to the fact that the forklift position was a less arduous and cleaner job than other track laborer positions. Brown testified that other employees, including Ellis, complained about a junior employee being allowed to work the forklift instead of "a more senior man." Other witnesses testified that the forklift job was generally considered a physically easier and cleaner job than other track laborer positions, although it required more qualifications. Joiner testified that other track laborers complained about White being allowed to hold the position instead of a male employee.

During the September 26 meeting regarding the resolution of White's internal sexual discrimination complaint, Brown informed White that he was removing her from the forklift position and assigning her to a standard track laborer position because of her coworkers' complaints. Her pay and benefits remained the same, but her new job was, by all accounts, more arduous and "dirtier" than the forklift position. Brown replaced White with Ellis, the only other employee qualified to perform the forklift job. Brown admitted at trial that he had heard complaints about White being allowed to work the

forklift before she complained of discrimination but that he did not remove her from the position until after she complained of discrimination.

Brown's trial testimony is inconsistent with Burlington Northern's interrogatory response. In that response, the railroad stated that it removed White from the forklift position because a more senior employee claimed the job according to the collective bargaining agreement. Brown, however, testified at trial that the forklift job was not governed by the collective bargaining agreement and that he had the discretion to place anyone he chose in that position regardless of seniority. Moreover, neither the union, nor anyone else, initiated a grievance about White's operation of the forklift. A union official testified that the union's records did not reflect any complaints regarding White's assignment to the forklift position. Only White and Ellis were qualified to perform the forklift position. Ellis, who had voluntarily resigned from the forklift job for a higher-paying job, testified that he did not complain to Brown or anyone else about White operating the forklift and that he did not request that he be returned to the position.

On October 10, 1997, White filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging sex discrimination and retaliation. She filed a second charge with the EEOC on December 4, 1997, alleging retaliation. In her second EEOC charge she alleged that Brown had placed her under surveillance and was checking on her daily activities. Her second EEOC charge was mailed to Brown on December 8, 1997.

On December 11, 1997, White was working in Blytheville, Arkansas, supporting a regional tie gang. She was working under the supervision of Burlington Northern foreman Percy Sharkey. At some point during the day, Sharkey instructed White to ride in a truck with another foreman, James Key. Sharkey instructed another track laborer, Greg Nelson, to ride

with him in his vehicle. According to White, when she approached Key he told her that she had to ride with Sharkey because Key wanted Nelson to ride with him. Against Sharkey's order, Nelson rode away with Key. White testified that Sharkey became very upset when she returned and told him that Nelson had ridden away with Key and that she would have to ride with him. Contrary to White's testimony, Sharkey testified that White refused to ride with Key, claiming that she had seniority over Nelson and insisting upon riding with Sharkey.

According to Sharkey, he called Brown to discuss the situation and Brown told him that, based on Sharkey's description of events, White had been insubordinate and should be removed from service immediately. On the afternoon of December 11, Sharkey informed White that she was suspended. Although Sharkey had the authority to suspend White himself, Sharkey testified that Brown made the decision to suspend White. Brown testified that Sharkey made the decision. White testified that Sharkey told her at the time that Brown had instructed him to suspend her. In a letter to the EEOC, Burlington Northern stated that Brown made the decision, but Brown testified that this letter was incorrect. Nelson received no discipline, although Sharkey acknowledged at trial that Nelson had disobeyed his direct order.

White testified that Sharkey had told her at some point before her suspension that Brown considered White a "troublemaker." Sharkey acknowledged at trial that he had told White that the railroad was trying to "get rid" of her.

The decision to suspend White occurred seven days after White filed her second EEOC charge and three days after the charge was mailed to Brown. The suspension took effect immediately and was without pay. According to company policy, the suspension without pay would automatically become a termination if White did not file a grievance with her union appealing the decision within fifteen days. White

timely filed such a grievance and also filed another EEOC charge on December 15, 1997, alleging retaliation.

While her grievance was pending, White was without a job and without income and she did not know if or when she would be allowed to return to work. During this period, White sought medical treatment for emotional distress and incurred medical expenses. The grievance remained pending through the end of December and the first half of January 1998. After an investigation and a hearing, the hearing officer, who was a Burlington Northern manager, found that White had not been insubordinate and that she should not have been suspended. After being suspended without pay for thirty-seven days, White was reinstated to her position with full back pay on January 16, 1998.

After exhausting her avenues for relief before the EEOC, White filed this action against Burlington Northern in the district court, alleging sex discrimination and retaliation in violation of Title VII. A jury trial was conducted from August 29, 2000, to September 5, 2000. The jury returned a verdict in favor of Burlington Northern on White's sex discrimination claim and a verdict in favor of White on her retaliation claim. The jury awarded White $43,500 in compensatory damages, including $3,250 in medical expenses, on her retaliation claim. The jury found against White on her claim for punitive damages. After the trial, pursuant to Federal Rule of Civil Procedure 50(b), Burlington Northern filed a renewed motion for judgment as a matter of law on the retaliation claim, which the district court denied. White filed a motion for an award of attorney's fees pursuant to 42 U.S.C. § 2000e-5(k), and the district court awarded White $54,285, which represented eighty percent of White's total attorney's fees.

II. MOTION FOR JUDGMENT AS A MATTER OF LAW

We first review the district court's denial of Burlington Northern's post-trial motion for judgment as a matter of law pursuant to Rule 50(b). Our standard of review is *de novo*. *Gray v. Toshiba Am. Consumer Prods., Inc.*, 263 F.3d 595, 598 (6th Cir.2001). The inquiry for resolving a motion for judgment as a matter of law pursuant to Rule 50 is the same as the inquiry for resolving a motion for summary judgment pursuant to Rule 56. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). We review all of the evidence in the record in the light most favorable to the nonmoving party and determine whether there was a genuine issue of material fact for the jury. *Gray*, 263 F.3d at 598.

We must affirm the jury verdict unless there was "no legally sufficient evidentiary basis for a reasonable jury to find for [the prevailing] party." Fed.R.Civ.P. 50(a). We draw all reasonable inferences in favor of the prevailing party, and we do not make any credibility determinations or weigh the evidence. *Reeves*, 530 U.S. at 150, 120 S.Ct. 2097. Therefore, we "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 151, 120 S.Ct. 2097. "That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

Burlington Northern contends that it is entitled to judgment as a matter of law on White's retaliation claim because, according to Burlington Northern, neither White's transfer from the forklift job to a standard track laborer job nor her suspension without pay for thirty-seven days constitutes an

adverse employment action for purposes of Title VII. In the alternative, Burlington Northern contends that there was insufficient evidence for the jury to conclude rationally that Burlington Northern's asserted legitimate, non-discriminatory reasons for transferring and suspending White were pretexts for retaliation.

In determining whether Burlington Northern is entitled to judgment as a matter of law, we first discuss the meaning of "adverse employment action" for purposes of Title VII. Then we discuss whether White's transfer and suspension were adverse employment actions. Finally we address whether there was sufficient evidence for the jury to rationally find that Burlington Northern's asserted legitimate reasons were pretexts for unlawful retaliation.

A. Defining Adverse Employment Action

Title VII's anti-retaliation provision provides:

> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings
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> It shall be an unlawful employment practice for an employer to *discriminate against* any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (section 704(a) of Title VII) (emphasis added). Title VII does not define the phrase "discriminate against," which is repeated in Title VII's other anti-discrimination provisions, but courts have made clear that not just any discriminatory act by an employer constitutes discrimination under Title VII. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633

(1998) (citing cases requiring a "tangible employment action" to support a Title VII claim). Employment actions that are *de minimis* are not actionable under Title VII. *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 462 (6th Cir.2000). "If every low evaluation or other action by an employer that makes an employee unhappy or resentful were considered an adverse action, Title VII would be triggered by supervisor criticism or even facial expressions indicating displeasure." *Primes v. Reno*, 190 F.3d 765, 767 (6th Cir.1999).

To prevent lawsuits based upon trivial workplace dissatisfactions, we require that a plaintiff prove the existence of an "adverse employment action" to support a Title VII claim. *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir.1999) (defining "adverse employment action" as a "materially adverse change in the terms and conditions of [plaintiff's] employment").[1] This case requires us to clarify further the meaning of "adverse employment action" for purposes of Title VII.

The first time this court required a plaintiff to prove the existence of an "adverse employment action" as part of a Title VII claim was in *Geisler v. Folsom*, 735 F.2d 991 (6th Cir.1984). In *Geisler*, the plaintiff alleged that her employer violated Title VII's anti-retaliation provision by discrim-

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[1] Although this court and most other courts use the term "adverse employment action," some courts, including the Supreme Court, use the term "tangible employment action" or some other variation for the same concept. *See, e.g., Burlington Indus.*, 524 U.S. at 761, 118 S.Ct. 2257 ("tangible employment action"); *Bowman*, 220 F.3d at 461 n. 5 ("Courts use the terms 'tangible employment detriment' and 'materially adverse employment action' interchangeably.").

As the one alternative to showing the existence of an adverse employment action, a plaintiff may support a Title VII claim by showing that "plaintiff was subjected to severe or pervasive retaliatory [or other discrimination based] harassment by a supervisor." *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792 (6th Cir.2000). What constitutes severe or pervasive harassment is not at issue in this appeal.

inating against her for filing a sex discrimination charge with the EEOC. After a bench trial, the district court found that "[p]laintiff failed to show any adverse employment action in response to her EEOC charge or any other protected activity. While additional tension arose after others became aware of [plaintiff]'s charge, such 'predictable tension' is not 'the type of adverse employment action prohibited by Title VII's retaliation clause.'" 735 F.2d at 994 (quoting the district court). This court affirmed, stating:

> We agree with the district judge that a general increase of tension in the workplace would be expected to follow revelation that a claim of discrimination in employment had been filed. However, evidence of such an increase should be considered, and any discrete act or course of conduct which could be construed as retaliation must be examined carefully. After such examination we conclude that the finding that no 'adverse employment action' resulted from the filing of the EEOC charge is not clearly erroneous, particularly in view of the contrary evidence. . . .

735 F.2d at 996 (quoting the district court's use of the phrase "adverse employment action").

A few months after deciding *Geisler*, this court stated that to support a claim for retaliation under Title VII a "plaintiff must establish: (1) that he engaged in activity protected by Title VII; (2) that he was the subject of adverse employment action; and (3) that there exists a casual [sic] link between his protected activity and the adverse action of his employer." *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 375 (6th Cir.1984). The *Jackson* court did not cite *Geisler* as a basis for including "adverse employment action" among the elements of a Title VII retaliation claim; instead it relied upon cases from the Fifth, Tenth, and Eleventh Circuits. *Id.* (citing *Burrus v. United Tel. Co. of Kansas, Inc.*, 683 F.2d 339, 343 (10th Cir.1982); *Jones v. Lumberjack Meats, Inc.*, 680 F.2d

98, 101 (11th Cir.1982); *Whatley v. Metro. Atlanta Rapid Transit Auth.*, 632 F.2d 1325, 1328 (5th Cir.1980)). The cases cited by *Jackson*, like *Jackson* itself, each involved a termination of employment, and so none of these cases addressed the issue of what types of employment actions short of termination constitute adverse employment actions.[2]

Ever since *Geisler* and *Jackson*, the adverse-employment-action element has remained a part of a Title VII claim in this circuit. After *Geisler*, the first time that this court decided a case based on the adverse-employment-action element was in *Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir.1987). In *Yates*, this court reversed a district court's factual finding of retaliation, holding that it was clear error for the district court to find that a temporary job reassignment that resulted in no pay or benefits reduction was an adverse employment action cognizable under Title VII's anti-retaliation provision. For this holding, the *Yates* court relied solely upon a district court decision from Delaware. *Id.* (citing and endorsing *Ferguson v. E.I. duPont deNemours and Co.*, 560 F.Supp. 1172, 1201

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[2] The decisions cited by *Jackson* from the Tenth and Eleventh Circuits, *Burrus* and *Jones*, both cite *Smalley v. City of Eatonville*, 640 F.2d 765, 769 (5th Cir.1981), which in turn cites *Whatley* as the basis for including "adverse employment action" among the elements of a Title VII claim. *Whatley* cites a treatise published in 1976. 632 F.2d at 1328 (citing B. Schlei & P. Grossman, Employment Discrimination Law, Ch. 15 (1976)). It appears that the inclusion of "adverse employment action" as an element of a Title VII claim originated with the treatise cited by *Whatley*. *See Williams v. Boorstin*, 663 F.2d 109, 120 (D.C.Cir.1980) (J. Bazelon, concurring) (stating that "adverse employment action" is among the elements of a Title VII retaliation claim under "the standard found in B. Schlei & P. Grossman. Employment Discrimination Law 436 (1976)"). The first reported case in the nation to include "adverse employment action" as an element of a Title VII claim was decided the year after publication of the treatise. *EEOC v. Locals 14 and 15 Int'l Union of Operating Eng'rs*, 438 F.Supp. 876, 881 (S.D.N.Y.1977).

(D.Del.1983), which held that a job reassignment is not an adverse employment action if it is only temporary and results in no reduction in pay or benefits).

After *Yates*, it was almost ten years before we had another opportunity to develop the definition of adverse employment action. In *Kocsis v. Multi-Care Management Inc.*, this court considered the definition of adverse employment action in the context of a discrimination claim under the Americans with Disabilities Act. 97 F.3d 876, 885-87. Relying in part upon the Seventh Circuit's definition, this court held that a plaintiff claiming employment discrimination must show that she suffered "a materially adverse change in the terms of her employment." *Id.* at 885 (citing *Spring v. Sheboygan Area Sch. Dist.*, 865 F.2d 883 (7th Cir.1989), which involved an age discrimination claim). A "mere inconvenience or an alteration of job responsibilities" or a "bruised ego" is not enough to constitute an adverse employment action. *Id.* at 886 (citing *Crady v. Liberty Nat'l Bank and Trust Co.*, 993 F.2d 132, 136 (7th Cir.1993), and *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456 (7th Cir.1994)).

Furthermore, according to *Kocsis*, "reassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims." *Id.* at 885 (citing *Yates*, 819 F.2d at 638, which applied to "temporary" reassignments). A reassignment without salary or work hour changes, however, may be an adverse employment action if it constitutes a demotion evidenced by "a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Id.* at 886 (citing *Crady*, 993 F.2d at 136).

In this circuit, *Kocsis* is the seminal case for defining adverse employment action.[3] The Supreme Court in *Burlington Industries v. Ellerth* relied upon *Kocsis* and several decisions from other circuits when it stated that "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). The Supreme Court also observed that:

> A tangible employment action in most cases inflicts direct economic harm. . . . Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.

Id. at 762, 118 S.Ct. 2257. *But see Ray v. Henderson*, 217 F.3d 1234, 1242 n. 5 (9th Cir.2000) (rejecting the contention that *Burlington Industries* set forth a standard for adverse employment actions in the retaliation context).

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[3] For instance, in *Hollins v. Atlantic Co.*, this court relied upon *Kocsis* to decide that an employee had not suffered an adverse employment action when she received lower ratings in a performance evaluation. 188 F.3d 652, 662 (6th Cir.1999). The *Hollins* court held that lower ratings were not enough in the absence of "evidence to show that the lowered performance ratings actually had an effect on her wages such that a court may conclude that there was a materially adverse employment action." *Id.* In *Bowman v. Shawnee State University*, this court relied upon *Kocsis* and *Hollins* to hold that the temporary removal of a university instructor from his position as the Coordinator of Sports Studies did not rise to the level of an adverse employment action. 220 F.3d 456, 461-62 (6th Cir.2000). The *Bowman* court focused on the facts that the removal was for only ten days, the employee maintained his position as a full-time university instructor, and he never lost any income. *Id.*

In this appeal, White and the EEOC, which has filed an *amicus curiae* brief on White's behalf, urge us to revise our definition of adverse employment action for purposes of Title VII retaliation cases and adopt the interpretation included in the EEOC Guidelines. The EEOC has interpreted "adverse employment action" in the context of a Title VII retaliation claim to mean "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity." EEOC Compliance Manual § 8, "Retaliation," ¶ 8008 (1998). Although EEOC Guidelines are not binding on the courts, they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)).

The EEOC claims that this court's development of the adverse-employment-action element has been unfaithful to the letter and purpose of Title VII's anti-retaliation provision. According to 42 U.S.C. § 2000e 3(a), it is unlawful for an employer to "discriminate against" an employee for engaging in protected conduct. The EEOC contends that the most natural reading of this language is that it prohibits "any form of discrimination" against an individual for opposing discrimination or filing a charge. The Ninth and Seventh Circuits have also embraced a broad interpretation of Title VII's anti-retaliation provision. *See Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir.2000) ("This provision does not limit what type of discrimination is covered, nor does it prescribe a minimum level of severity for actionable discrimination."); *Knox v. State of Indiana*, 93 F.3d 1327, 1334 (7th Cir.1996) ("There is nothing in the law of

retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint.").[4]

Despite the EEOC's contention that "any form of discrimination" falls within the most natural reading of the statute, the EEOC acknowledges in its brief that its definition of adverse employment action excludes "petty slights and trivial annoyances" and anything that is not reasonably likely to deter employees from engaging in protected activity. The EEOC does not explain how it justifies excluding such discriminatory acts under its strictly literal reading of the statute, which prohibits discrimination without any explicit textual limitation regarding the type of discrimination or level of severity required. Therefore, the EEOC admits that a strictly literal reading of "discriminate against" is not a fair interpretation of Title VII since it is unlikely that Congress intended to authorize Title VII claims over trivial matters.

We developed the adverse-employment-action element to prevent the kind of claims based upon trivial employment actions that a strictly literal reading of Title VII's anti-retaliation provision would allow. Because the language of Title VII does not explicitly provide any limit on the types of discriminatory acts prohibited, the language of Title VII does not favor the EEOC's proposed limitations over the limitations this court has developed during the last twenty years of defining the adverse-employment-action element of a Title VII claim.

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[4] We have recognized that the dictionary definition of "discriminate" is "to distinguish; to make distinctions in treatment; show partiality or prejudice." *Mattei v. Mattei*, 126 F.3d 794, 804 (6th Cir.1997) (quoting Webster's New World Dictionary); *see also* Oxford English Dictionary (2d ed.1989) ("to discriminate against: to make an adverse distinction with regard to; to distinguish unfavorably from others").

The EEOC argues that the purpose of Title VII's anti-retaliation provision supports its definition. "In enacting section 2000e-3, Congress unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation." *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 543 (6th Cir.1993). While the EEOC's proposed definition more overtly incorporates the purpose of Title VII's anti-retaliation provision, this court's definition, properly interpreted, also accomplishes the goal while appropriately counterbalancing the need to prevent lawsuits based upon trivialities. Instead of requiring district courts to determine on a case-by-case basis what actions by an employer are reasonably likely to deter an employee from engaging in protected activity, we have over the last twenty years given some shape to the definition by describing the kinds of material adverse employment actions that rise above the level of trivial. As we recognized in *Kocsis*, however, it is impossible to list every possible employment action that falls into the definition of adverse employment action and a court must consider "indices that might be unique to a particular situation." *Kocsis*, 97 F.3d at 886.

In addition, this court's definition has the benefit of applying equally to all Title VII discrimination claims, not only to retaliation claims. Having a different standard for different provisions of Title VII would be burdensome and unjustified by the text of the statute, which uses the same phrase "discriminate against" in each of its anti-discrimination provisions. *See Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 791-92 (6th Cir.2000) (applying rules of statutory construction to hold that "discriminate against" means the same thing each time it appears in Title VII); *Mattei v. Mattei*, 126 F.3d 794, 806 (6th Cir.1997) (presum-

ing that Congress intended the phrase "discriminate against" to have the same basic meaning each time it is used in a statute).[5]

We therefore reject White's and the EEOC's request that we adopt a new definition of adverse employment action for purposes of Title VII retaliation cases, and we reaffirm the definition that we have developed in cases such as *Kocsis* and its progeny. Since the adverse-employment action element developed by this Circuit is an exception to a broad, strictly

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[5] Although both § 2000e-2(a)(1) and § 2000e-3(a) use the phrase "discriminate against," the former specifies that the prohibited discrimination must be "with respect to his compensation, terms, conditions, or privileges of employment," while the anti-retaliation provision contains no such language. The parties dispute whether this additional language is a limitation or an expansion of the conduct prohibited. We have never before distinguished between the types of conduct prohibited in the different provisions, and we do not do so here. We find it untenable to interpret the additional language as an expansion of prohibited conduct because "with respect to" is a phrase commonly used to limit. *But cf. Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 709 (5th Cir.1997) ("The anti-retaliation provision speaks only of 'discrimination'; there is no mention of the vague harms contemplated in § 2000e-2(a)(2). Therefore, this provision can only be read to exclude such vague harms, and to include only ultimate employment decisions."). The D.C. Circuit and the United States District Court for the Northern District of Ohio have written well-reasoned opinions that conclude that the absence of the additional language from the anti-retaliation provision means that an employer is prohibited from retaliating in materially adverse ways, regardless of whether the retaliatory acts affect employment. *Passer v. American Chem. Soc.*, 935 F.2d 322, 330-31 (D.C.Cir.1991) (holding that an employer's cancellation of a major public symposium in former employee's honor could be an act of retaliation under a statute that parallels Title VII's anti-retaliation provision); *EEOC v. Outback Steakhouse of Florida, Inc.*, 75 F.Supp.2d 756, 758-60 (N.D.Ohio 1999) (holding that Title VII's anti-retaliation provision is not limited to discrimination affecting employment). It is unnecessary for us to resolve the question addressed in *Passer* and *Outback Steakhouse* because the actions at issue in the present case (job transfer and suspension) clearly affect employment.

literal reading of Title VII's anti-discrimination provisions, we will continue to define the exception narrowly so as not to frustrate the purpose of Title VII while deterring lawsuits over trivial matters.

B. Suspension Without Pay

We now apply our definition of adverse employment action to the actions at issue in the present case. We consider the suspension first. Burlington Northern argues that a suspension without pay, followed thirty-seven days later by a reinstatement with back pay, is not an adverse employment action. For this argument, Burlington Northern primarily relies upon *Dobbs-Weinstein v. Vanderbilt University*, 185 F.3d 542 (6th Cir.1999).

In May 1994, a Vanderbilt University dean denied tenure to Professor Dobbs-Weinstein and advised her that her teaching appointment at Vanderbilt would end on August 31, 1995. *Id.* at 543. Dobbs-Weinstein filed an internal grievance with Vanderbilt, alleging gender and national-origin discrimination among other things, and in May 1995, she filed an action under Title VII. *Id.* On August 31, 1995, her employment contract with Vanderbilt ended. *Id.* at 544. In November 1995, while her lawsuit was still pending, the Vanderbilt Board of Trustees reversed the decision of the dean and rehired her as a tenured professor. *Id.* The board also granted her back pay to account for the delayed promotion and the period of unemployment. *Id.* Dobbs-Weinstein persisted with her lawsuit, however, seeking interest on the back pay and compensation for emotional distress and injury to reputation. *Id.*

Despite the facts that she was initially denied tenure and her employment ended temporarily, this court held that Dobbs-Weinstein had not suffered an adverse employment action cognizable under Title VII. *Id.* at 545. We recognized that "'tenure decisions in an academic setting involve a

combination of factors which tend to set them apart from employment decisions generally.'" *Id.* (quoting *Zahorik v. Cornell Univ.*, 729 F.2d 85, 92-93 (2d Cir.1984)). We relied upon the fact that Vanderbilt reversed the decision of its dean and granted Dobbs Weinstein back pay as the result of its internal grievance procedure. *Id.* This reversal, we reasoned, was the "ultimate employment decision." *Id.* We held that "intermediate" tenure decisions that are appealable through a tenure review process cannot form the basis of a Title VII claim. *Id.* We did not, however, cite any section of Title VII that requires exhaustion of internal grievance procedures before one files a lawsuit.[6] Instead, we relied upon a decision from the Fourth Circuit, *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.1981), which we interpreted as holding that Title VII applies only to "ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating." *Id.* Neither the Fourth Circuit nor the *Dobbs-Weinstein* court, however, cited a statutory provision that limits Title VII's application to ultimate employment decisions.

Since deciding *Page*, the Fourth Circuit has retreated from the "ultimate employment decision" standard. *Von Gunten v. Maryland*, 243 F.3d 858, 865, 866 n. 3 (4th Cir.2001) (limiting *Page* and holding that "'ultimate employment decision' is not the standard in this circuit"). Furthermore, the majority of other circuits have either implicitly or explicitly rejected a standard limiting Title VII's reach to ultimate employment decisions. *See id.* at 864, 866 n. 4 (citing cases).

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[6] In fact, as will be mentioned again below, the Supreme Court has pointed out to this court before that internal grievance procedures and an action under Title VII are "legally independent" such that the statute of limitations on a Title VII claim is not tolled during the pendency of an internal grievance process. *Int'l Union of Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976) (reversing a Sixth Circuit decision).

Indeed, the only other circuits where this standard even arguably has any viability are the Fifth and the Eighth. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.1997) (applying the "ultimate employment decision" standard); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir.1997) (same).

The Fifth Circuit, however, has questioned whether the "ultimate employment decision" standard survived the Supreme Court's pronouncements in *Burlington Industries* regarding the definition of tangible employment action. *Fierros v. Texas Dep't of Health*, 274 F.3d 187, 192-93 & n. 2 (5th Cir.2001) (pretermitting question); *but see Hernandez v. Crawford Bldg. Material Co.*, 321 F.3d 528, 531 (5th Cir.2003) (applying "ultimate employment decision" standard without discussing *Burlington Industries* or *Fierros*). And while the Eighth Circuit has ostensibly adopted the "ultimate employment decision" standard, it has consistently applied a broader standard. *See, e.g., Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir.1997) (ultimate employment decision includes "tangible change in duties or working conditions that constituted a material employment disadvantage"); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir.1997) (ultimate employment decision includes reduction of duties, actions that disadvantage or interfere with the employee's ability to do his or her job, "papering" of an employee's file with negative reports and reprimands even though employee was "not discharged, demoted, or suspended").

We now join the majority of other circuits in rejecting the "ultimate employment decision" standard.[7] First and fore-

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[7] We recognize that our decision in *Dobbs-Weinstein* was based in part upon the unique nature of "tenure decisions in an academic setting." 185 F.3d at 545. Other circuits also have acknowledged the unique nature of tenure decisions. *See Tanik v. S. Methodist Univ.*, 116 F.3d 775, 776 (5th Cir.1997); *Brousard-Norcross v. Augustana Coll. Ass'n*, 935 F.2d 974,

most, it is contrary to the plain language of Title VII, which provides that an employer must not "discriminate against" an employee based upon a prohibited classification. As this court has found, the words "discriminate against" literally mean "*any kind* of adverse action." *Mattei*, 126 F.3d at 805. Congress could have provided that employers shall not "discriminate against an employee when making ultimate employment decisions," but instead it chose to use the words "discriminate against" with no such qualifier.

Second, the employment action taken in the present case (suspension without pay for thirty-seven days) is not the type of employment action that this court developed the adverse-employment-action element to filter. The adverse-employment-action element is a warranted judicial interpretation of Title VII intended to deter discrimination lawsuits based on trivial employment actions, such as those that cause a "mere inconvenience" or a "bruised ego." *Kocsis*, 97 F.3d at 886. But as an exception to the strictly literal reading of the statute, the adverse-employment-action element of a Title VII lawsuit must not be interpreted too broadly. Taking away an employee's paycheck for over a month is not trivial, and if motivated by discriminatory intent, it violates Title VII. *See Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 223-24 (2d Cir.2001) (holding that a suspension without pay for one week was an adverse employment action even though the employee was later reimbursed for lost wages because the employee "suffered the loss of the use of her wages for a time").

Third, the "ultimate employment decision" standard contravenes "the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment

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976 (8th Cir.1991); *Kumar v. Bd. of Trs., Univ. of Mass.*, 774 F.2d 1, 14 (1st Cir.1985); *Zahorik*, 729 F.2d at 92-93 (2d Cir.1984). Because we are not presented here with a denial of tenure, we do not decide to what extent our holding in *Dobbs-Weinstein* survives our decision in this case.

discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). While the standard ensures that a wrongfully suspended employee eventually receives back pay, it allows an employer unilaterally to cut off the employee's claims for other damages, which have been explicitly authorized by Title VII since the Civil Rights Act of 1991, such as interest on the back pay, attorney's fees, emotional suffering, and punitive damages. 42 U.S.C. §§ 1981a(b); 2000e-5(g), (k). Although Burlington Northern argues that it made White whole when it granted her back pay, Congress has declared that part of making a Title VII plaintiff whole is compensating her for interest on the back pay, attorney's fees, and emotional suffering. In this case, the jury found that White had suffered $43,500 in damages other than back pay due to Burlington Northern's retaliation.

Lastly, the "ultimate employment decision" standard is in tension with Supreme Court cases holding that the statute of limitations on a Title VII claim is not tolled during the pendency of an internal grievance process. *See, e.g., Int'l Union of Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976). According to the Supreme Court, a Title VII claim arises on the date the alleged discriminatory decision occurs, even though an employee has challenged the decision via an internal grievance process. *Id.* at 234, 97 S.Ct. 441. The Supreme Court has rejected the argument that the pendency of an internal grievance process renders the employment decision "tentative" or "non-final" for purposes of Title VII. *Id.* The Supreme Court has also rejected the argument that "the danger of possible conflict between the concurrent pursuit of both collective-bargaining and Title VII remedies should result in tolling the limitations period for the latter while the former proceeds to conclusion." *Id.* at 239, 97 S.Ct. 441. The alleged discriminatory decision in the present case was the suspension without pay. White's election to challenge

this decision through an internal grievance process does not render the decision not actionable under Title VII.

The Equal Employment Advisory Council (the EEAC) argues in its *amicus curiae* brief on behalf of Burlington Northern that employers must maintain the prerogative to suspend summarily employees suspected of wrongdoing pending an investigation without facing the risk of Title VII liability. Otherwise, according to the EEAC, employers will be faced with the dilemma of either allowing potentially dangerous or disruptive individuals to remain in the workplace or suspending them pending an investigation, thereby risking Title VII liability.

In response to the EEAC's concerns, we initially note that an employer taking an adverse employment action against an employee, including a suspension without pay, only risks Title VII liability if there exists sufficient evidence to prove that the employer took the action based upon illegal discrimination. To the extent the EEAC's concerns for an employer's risk of Title VII liability are valid, however, they are allayed by *Jackson v. City of Columbus*, which holds that a suspension *with* pay and full benefits pending a timely investigation into suspected wrongdoing is not an adverse employment action. 194 F.3d 737, 752 (6th Cir.1999). In *Jackson*, we held that there was no adverse employment action when a mayor effectively suspended with pay a police chief for four days pending an investigation of the police chief's alleged improper conduct in office. *See id.* at 744 (noting that the mayor referred to the suspension with pay of the police chief as a reassignment "to his residence").[8]

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[8] The National Employment Lawyers Association in its *amicus curiae* brief on behalf of White concedes that a suspension with pay pending a timely, good-faith investigation does not constitute an adverse employment action and recommends this course to employers concerned about possible misconduct.

C. Job Transfer

Next we consider whether the job transfer at issue in the present case was an adverse employment action. Burlington Northern appeals the district court's decision that transferring White from her forklift operator job to a standard track laborer job was an adverse employment action. We agree with the district court.

While the standard track laborer job paid the same as the forklift operator position, White's new position was by all accounts more arduous and "dirtier." Furthermore, the forklift operator position required more qualifications, which is an indication of prestige. *See Kocsis*, 97 F.3d at 886-87 (finding that the plaintiff had failed to show an adverse employment action because, among other things, her job reassignment did not entail any loss in prestige). According to Burlington Northern's own witnesses, the transfer occurred because the forklift operator position was objectively considered a better job and the male employees resented White for occupying it. In essence, as the district court found, the reassignment was a demotion evidenced by "indices . . . unique to [the] particular situation." *Kocsis*, 97 F.3d at 886; *see also Burlington Indus., Inc.*, 524 U.S. at 761, 118 S.Ct. 2257 (defining "tangible employment action" for purposes of Title VII liability as including a job "reassignment with significantly different responsibilities"); *Mattei*, 126 F.3d at 808 (stating that transferring an employee at the same salary to "some wretched backwater" is "clearly" actionable in a retaliation claim).

D. Evidence of Pretext

Having rejected Burlington Northern's arguments that there was no adverse employment action taken against White, we now address Burlington Northern's alternative argument in support of reversing the district court's denial of its motion for judgment as a matter of law. Burlington Northern appeals the district court's decision that there was sufficient evidence

from which the jury reasonably concluded that Burlington Northern's asserted legitimate, non-discriminatory reasons for removing White from the forklift position and then suspending her were pretexts for unlawful retaliation. We agree with the district court.

White presented to the jury substantial evidence to contradict Burlington Northern's asserted legitimate reasons, including contradictory statements from Burlington Northern's own officers. Burlington Northern asserted one reason for transferring White in its interrogatory response, but then Brown, the official who made the decision to transfer White, asserted a different, contradictory reason at trial. Furthermore, Brown testified that he transferred White in part based upon complaints from Ellis, but at trial Ellis denied complaining about White. Regarding the suspension, the evidence was not even consistent regarding who made the decision, much less the motivation for the decision. Brown testified that Sharkey made the decision to suspend White, while Sharkey testified that Brown made the decision. Burlington Northern asserts that Brown suspended White for insubordination, but another Burlington Northern official who served as a hearing officer for White's internal grievance concluded that White had not been insubordinate. White's second EEOC charge accused Brown of violating Title VII, and White was suspended three days after this charge was mailed to Brown.

Based upon all the evidence, including the contradictory evidence from Burlington Northern's own officers, the jury was entitled to find that Burlington Northern's asserted legitimate reasons were false and were pretext for unlawful retaliation. *See Reeves*, 530 U.S. at 147, 120 S.Ct. 2097 (holding that a jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability).

III. ATTORNEY'S FEES

Burlington Northern's last issue on appeal is a challenge to the amount the district court awarded White in attorney's fees. The district court awarded White eighty percent of her attorney's fees based on her degree of success in the lawsuit. Burlington Northern argues that White was not as successful as the district court found and that her attorney's fee award should be reduced.

We review a district court's determination regarding the amount of an award of attorney's fees under Title VII for an abuse of discretion. *Scales v. J.C. Bradford and Co.*, 925 F.2d 901, 909 (6th Cir.1991). "This deference, 'is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.'" *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). Under Title VII, a district court has discretion to award a prevailing party "a reasonable attorney's fee." 42 U.S.C. § 2000e-5(k). In determining what constitutes a reasonable attorney's fee, the degree of success achieved in the lawsuit is a crucial factor. *Scales*, 925 F.2d at 910.

Although we may have awarded a different amount if we were considering the issue *de novo*, we do not find that the district court abused its discretion in awarding White eighty percent of her attorney's fees. White brought two claims in this lawsuit (sex discrimination and retaliation) but only prevailed on one (retaliation). As the district court correctly stated in its written decision, however, both of these claims arose from a common set of facts, and it would be difficult to divorce work done on one claim from work done on the other. In light of this consideration and others addressed by the district court in its decision, we find that the district court did not abuse its discretion in awarding White eighty percent of her attorney's fees.

IV. PUNITIVE DAMAGES

In her cross-appeal, White asserts that the district court erred in charging the jury on punitive damages. The district court instructed the jury that punitive damages may be considered if White showed by "clear and convincing" evidence that Burlington Northern acted "either intentionally, recklessly, maliciously, or fraudulently." The jury did not award White punitive damages. White contends that the appropriate burden of proof on a claim for punitive damages under Title VII is a preponderance of the evidence, not clear and convincing evidence. White is correct.

According to Title VII, "[a] complaining party may recover punitive damages under this section against a respondent ... if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1); *see also Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999) (discussing what a plaintiff must prove to recover punitive damages under Title VII). Title VII is silent concerning the evidentiary standard for demonstrating malice or reckless indifference for purposes of a punitive damages claim. In the absence of more specific guidance, "[c]onventional rules of civil litigation generally apply in Title VII cases, and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality decision) (internal citation omitted); *see also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 2154, 156 L.Ed.2d 84 (2003) (holding that Title VII's silence with respect to an evidentiary standard suggests that a conventional preponderance of the evidence standard applies).

Other circuits have reached this same conclusion with respect to punitive damages claims generally, *see Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 282-83 (2d Cir.1990) (declining to apply a higher standard of proof than preponderance of the evidence for punitive damages award in products liability case because "such a change is best left for Congress or for higher judicial authority"); *In re Exxon Valdez*, 270 F.3d 1215, 1232 (9th Cir.2001) (applying preponderance standard to award of punitive damages in maritime case because Congress has not legislated a higher standard), and with respect to punitive damages in Title VII suits, *see Karnes v. SCI Colorado Funeral Servs., Inc.*, 162 F.3d 1077, 1080-82 (10th Cir.1998) (concluding that a preponderance of the evidence standard is applicable to claims for punitive damages under Title VII); *Notter v. N. Hand Prot.*, 89 F.3d 829, 1996 WL 342008, at *10-11 (4th Cir. June 21, 1996) (rejecting argument that the standard of proof for punitive damages in Title VII case is clear and convincing evidence because "[i]n discrimination cases brought under federal law, punitive damages need be proven only by a preponderance of the evidence").

The dissenting opinion states that punitive damages are an unconventional form of relief and therefore deserve a heightened standard of proof. Unquestionably, punitive damages serve a different purpose than compensatory damages. The requirement that punitive damages be awarded only when a defendant acts maliciously or recklessly recognizes this difference in purpose and ensures that punitive damages will be awarded only in the most egregious cases. Punitive damages are not, however, unconventional in the sense that they are a new or nontraditional form of relief. In fact, punitive damages have a long history in American civil litigation, where the traditional standard of proof has been "preponderance of the evidence." *See generally Jury Determination of Punitive Damages*, 110 Harv. L.Rev. 1513, 1531-32 (1997) (recognizing that preponderance of the

evidence is the traditional civil standard of proof). *Cf. Smith v. Wade*, 461 U.S. 30, 53-56, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983) (noting that "[t]here has never been any general common-law rule that the threshold for punitive damages must always be higher than that for compensatory liability" and rejecting actual malicious intent requirement for punitive damage award in § 1983 cases, even when underlying standard of liability for compensatory damages is recklessness).

The dissent, unable to point to any precedent imposing a higher standard of proof for Title VII punitive damages claims than preponderance of the evidence, also relies on authority not directly germane to the issue at hand. For instance, the dissent notes that, in recent years, public policy concerns, primarily about excessive punitive damage awards, have prompted many states to adopt a "clear and convincing" standard of proof for punitive damages. Trends at the state level, however, do not inform our consideration of punitive damages claims under the federal Title VII statute. In fact, the dissent's statistics indicate that, while many states applied a heightened standard of proof to state punitive damage claims at the time that Title VII was amended to permit such claims in 1991, a *majority* of states at that time chose not apply a heightened standard.

Moreover, to the extent that concerns about excessive punitive damage awards prompted the adoption of heightened standards of proof before or after 1991, those concerns do not exist under the Title VII statutory scheme. Under Title VII, damage awards—both compensatory and punitive—are capped, with $300,000 being the largest sum that can be awarded to a claimant against the largest employers, those with 500 or more employees.[9] 42 U.S.C. § 1981a(b)(3)(D).

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[9] The limits are lower for smaller employers, with the lowest limit being $50,000 for employers with 15-100 employees. 42 U.S.C. § 1981a(b)(3)(A)-(D).

The $300,000 limit is imposed on the sum of the compensatory and punitive damage awards; there is no separate limit for each type of damages. 42 U.S.C. § 1981a(b)(3). Thus, Title VII's own quite substantial restrictions on punitive damage awards guard against excessive awards.

Besides identifying trends at the state level, the dissent also cites cases that involve due process challenges to the application of a preponderance of the evidence standard of proof. Some of these cases concern situations wholly unrelated to punitive damages claims. *See Addington v. Texas*, 441 U.S. 418, 431-33, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (resolving, in the face of a due process challenge, the standard of proof required in a civil commitment hearing); *Santosky v. Kramer*, 455 U.S. 745, 747-48, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (determining the standard of proof that due process demands in the context of a parental rights termination proceeding). Other cases cited by the dissent implicate a due process challenge to large punitive damage awards. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 1519-20, 155 L.Ed.2d 585 (2003); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). While the Supreme Court has found excessive punitive damages awards to be violative of due process, *State Farm*, 123 S.Ct. at 1526, the Court has specifically rejected the notion that the Due Process Clause requires a higher standard of proof for punitive damages claims than preponderance of the evidence. *Pacific Mut. Life Ins.*, 499 U.S. at 23 n. 11, 111 S.Ct. 1032. The sole bit of assistance derived from any of these cases is the Court's direct rejection in *Pacific Mutual* of the notion that the Constitution requires a standard of proof any higher than preponderance of the evidence for punitive damages claims.

The only case relied on by the dissent that could be instructive is *Woodby v. INS*, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966), where the Supreme Court considered the

standard of proof for a deportation hearing. As in the instant case, the Court in *Woodby* was confronted with determining the standard of proof when "Congress has not addressed itself to the question of what degree of proof is required. . . ." *Id.* at 284, 87 S.Ct. 483. In *Woodby*, the Court held that for deportation proceedings, the standard of proof was "clear, unequivocal, and convincing evidence," *id.* at 286, 87 S.Ct. 483, which the dissent apparently references for the proposition that we should apply the same standard of proof here. While *Woodby* is helpful in its reminder that the judiciary has traditionally resolved the question of the proper standard of proof under a federal statute when Congress has not addressed the issue, *id.* at 284, 87 S.Ct. 483, it gives us no direction in this case. Its reasoning is based on the immediate hardship of deportation. Deportation, as an outcome of an administrative and judicial proceeding, bears little similarity to an award of damages, particularly an award under Title VII, which Congress has carefully restricted to limit its potential harm to employers.

Accordingly, in determining the proper standard of proof for a punitive damage claim under Title VII, we receive no specific guidance from the statutory language of the Act. Supreme Court precedent offers some assistance, however. Deriving that guidance from *Price Waterhouse* and *Desert Palace*—both of which specifically discuss standards of proof in Title VII cases—is more appropriate than looking to the Supreme Court's views on the standard of proof in dissimilar contexts or its stray comments about state or federal standards of proof in the course of deciding other issues. While there have been developments concerning the standard of proof for punitive damages claims at the state level, these trends do not support the conclusion that the "clear and convincing" standard applies to federal punitive damage claims under Title VII, which has its own limitations on punitive damage awards. Furthermore, as this case does not implicate a due process challenge to the size of a punitive damages award, or

to the standard of proof used in civil commitment hearings, hearings terminating parental rights, or in the context of deportation, we do not find the dissent's cited authority to be persuasive. Rather—in deciding the standard of proof to be applied to plaintiff's claim for punitive damages under Title VII—we choose to follow the guidance provided by the Supreme Court that "[c]onventional rules of civil litigation generally apply in Title VII cases." *Price Waterhouse*, 490 U.S. at 253, 109 S.Ct. 1775.

Therefore, the district court erred when it instructed the jury that White must prove her case for punitive damages by clear and convincing evidence. The district court, however, also erred when it instructed the jury that White only needed to prove that Burlington Northern acted "either intentionally, recklessly, maliciously, or fraudulently." As noted above, a plaintiff seeking punitive damages under Title VII must prove that the defendant acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." This standard requires a plaintiff to prove more than merely intentional discrimination. *Kolstad*, 527 U.S. at 536-37, 119 S.Ct. 2118 (explaining standard). In addition, the Supreme Court has stated that only under certain conditions may an employer be vicariously liable for punitive damages under Title VII. *Id.* at 545, 119 S.Ct. 2118 (specifying conditions).

Finally, the dissent questions whether plaintiff has presented sufficient evidence to submit the punitive damages issue to a jury under either standard and would resolve the issue in defendant's favor without remand. While defendant argues generally that plaintiff's evidence was insufficient to permit an award of punitive damages, the parties did not analyze the evidence with any specificity under either potentially applicable standard of proof in their briefing to this court. Nor have we focused on the sufficiency of the evidence to permit a punitive damage award, since this was

not the reason we granted an *en banc* hearing. We cannot find that the evidence is insufficient on a damage issue simply because judicial officers may disagree on an issue relating to liability, as the dissent suggests. Rather, in order to decide whether a trier of fact could award punitive damages in this case, a careful examination of the entire record is required. This exercise is most appropriately undertaken in the first instance by the district court. If the district court determines on remand that the evidence is sufficient to support a claim for punitive damages under the standard announced by the Supreme Court in *Kolstad*, then the district court should conduct a new trial on the issue of punitive damages only.

V. CONCLUSION

For all these reasons, we affirm the district court's denial of Burlington Northern's motion for judgment as a matter of law and the district court's award of attorney's fees to White. We conclude, however, that the district court erred in instructing the jury on the issue of punitive damages, and therefore we remand the case for further proceedings consistent with this opinion.

CLAY, Circuit Judge, concurring.

I join Parts I, III, and IV of the majority opinion. I also agree with Part II insofar as it rejects the untenable "ultimate employment action" doctrine, concludes that Sheila White's removal from her forklift position and her thirty-seven-day suspension constitute adverse employment actions within the meaning of Title VII, and affirms the district court's denial of Burlington's Rule 50 motion. Although the majority properly rejected the "ultimate employment action" doctrine this court embraced in *Dobbs-Weinstein v. Vanderbilt Univ.*, 185 F.3d 542, 545-46 (6th Cir.1999), I would be remiss if I failed to point out that such an express rejection of the "ultimate employment action" doctrine effectively overrules *Dobbs-Weinstein*. I write separately, however, because I disagree with the rule the majority today embraces with respect to what constitutes an adverse employment action within the meaning of Title VII's anti-retaliation provision, 42 U.S.C.2000e-3(a). Instead, I believe that the appropriate standard is the one articulated in the Ninth Circuit and advocated by the EEOC; i.e., an employer's retaliatory action is sufficiently adverse for § 704(a) purposes if it would be "reasonably likely to deter [employees] from engaging in protected activity." *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir.2000). The "reasonably likely to deter" standard is more consistent with § 704(a)'s statutory language and congressional intent, as well as Supreme Court case law.

A. Why the "Reasonably Likely to Deter" Rule is the Appropriate Standard for a Retaliation Case

1. Statutory and Case Law Support

The Supreme Court has repeatedly instructed courts, as a first step in interpreting a statute, "to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808,

(1997). The inquiry is at an end "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Id.* (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)). It is readily apparent from a reading of § 704(a) that Congress placed no limitations on the reach of the anti-retaliation provision.

Section 704(a) states that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge . . . under this subchapter." 42 U.S.C. § 2000e-3(a). The word "discriminate," in turn, is not defined in Title VII, but the scope is impliedly quite broad. A review of other Title VII provisions is revealing, inasmuch as § 703(a) prohibits employers from "fail [ing] or refus[ing] to hire or to discharge any individual, or otherwise *to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Thus, both §§ 703(a) and 704(a) use the term "discriminate," but only the general discrimination provision (§ 703(a)) places limitations on the word "discriminate." Congress chose not to place any limitations on "discriminate" within the meaning of § 704(a). Thus, a straightforward reading of the § 704(a)'s plain text makes clear that there is no statutory support for the idea that a decision to undertake retaliatory action must materially affect the terms and conditions of employment in order to violate its proscriptions. Indeed, the most natural reading of this language is that it prohibits any form of discrimination against an individual for opposing discrimination or filing a charge, regardless of whether that discrimination takes the form of, for example, termination, suspension, lateral transfer, harassment, or discipline. At least some of the circuits have

expressly agreed. *Smith v. Sec'y of Navy*, 659 F.2d 1113, 1119 n. 56 (D.C.Cir.1981) (noting that the language of the anti-retaliation provision "speaks unconditionally" and is not "limit[ed] to acts causing particular harms such as the loss of a particular job or promotion"); *Ray*, 217 F.3d at 1243 (noting that language of the anti-retaliation provision "does not limit what type of discrimination is covered, nor does it prescribe a minimum level of severity for actionable discrimination"); *Knox v. State of Indiana*, 93 F.3d 1327, 1334 (7th Cir.1996) ("There is nothing in the law of retaliation that restricts the type of retaliatory acts that might be visited upon an employee. . . .").

Incorporating by reference the limitations placed on "discriminate" in § 703(a) into "discriminate" in § 704(a) is altogether inappropriate. Such incorporation by reference is appropriate only when it is consistent with Congress' expressed intent. Section 704(a)'s legislative history is scant, and therefore we are left to look to its plain legislative text. Congress could quite easily have placed the same limitation on § 704(a) as it did on § 703(a), yet it chose not to do so. Congress' legislative intent, by all indications, was to remove all obstacles from an employee's ability to defend his or her Title VII rights by filing EEOC charges.

The Supreme Court, in *Russello v. United States*, confirmed its view against narrowly construing the meaning of a statute when the plain language unambiguously expressed its legislative purpose and intent. 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). In determining the proper applicability of the word "interest" as used in 18 U.S.C. § 1963(a)(1) in the context of a RICO case, the Supreme Court held that "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello*, 464 U.S. at 23, 104 S.Ct. 296

(quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir.1972)). Specifically, in discussing the particular statutory provision at issue, the Court noted that "[t]he argument for a narrow construction of § 1963(a)(1) is refuted by the language of the succeeding subsection (a)(2). 'The former speaks broadly of 'any interest . . . acquired,' while the latter reaches only 'any interest in . . . any enterprise which [the defendant] has established[,] operated, controlled, conducted or participated in the conduct of in violation of section 1962.'" *Id.* (quoting 18 U.S.C. § 1962). The Court went on to express its belief that if Congress had intended to restrict § 1963(a)(1), it presumably would have done so expressly as it did in the immediately following subsection. *Id.*

Contrary to the majority opinion, this Court has already embraced this logic. In *Lynch v. Johns-Manville Sales Corp.*, we held that when looking to stay proceedings in a Chapter 11 bankruptcy context, a solvent co-defendant may not use the automatic stay provision in 11 U.S.C. § 362(a), when the said provision facially stays proceedings "against the debtor," and fails to suggest that these rights may be invoked by any one other than the defendant. 710 F.2d 1194, 1198 (6th Cir.1983). The Court noted "[it] is a fundamental rule of statutory construction that inclusion in one part of a congressional scheme of that which is excluded in another part reflects a congressional intent that the exclusion was not inadvertent." *Id.* at 1197.

The Supreme Court case, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997), views § 704(a)'s legislative intent in this manner. In *Robinson*, the plaintiff sued his former employer, alleging that it had retaliated against him by giving him a negative employment reference to a potential employer. *Id.* There was no allegation that the former employer itself had made an ultimate employment decision, or that it took any adverse action that materially altered the plaintiff's job responsibilities. (Indeed,

it could not have done so, given that the plaintiff was no longer working for the employer at the time.) Nevertheless, a unanimous Court allowed the plaintiff's claim to proceed after holding that former employees may challenge retaliatory actions. *Id.* at 346, 117 S.Ct. 843. Although *Robinson* dealt specifically with the issue of determining who is an "employee" for purposes of Title VII's anti-retaliation provision (as opposed to what constitutes an adverse employment action), its reasoning is pertinent: a former employee counts as an employee within the meaning of § 2000e-3(a), because otherwise an employee could be fired in retaliation and not be able to sue. In so holding, the Court noted that an alternative statutory interpretation would have undermined or vitiated one of Title VII's most important purposes—maintaining "unfettered access to statutory remedial mechanisms." *Id.*

In line with the teachings of *Robinson* and the Supreme Court's view that § 704(a) should not be limited in its construction, this Court, in *EEOC v. Ohio Edison*, also interpreted § 704(a) to be a broad anti-retaliation provision that should reach as far as its intended protections allow. 7 F.3d 541, 545-46 (6th Cir.1993) (holding that Title VII's protections against retaliation extended to situations where an employee was discriminated against because his representative opposed an unlawful employment practice). In reaching this result, we stated that "[i]n enacting section 2000e-3, Congress unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation." *Id.* at *543*. We relied, in part, on the Supreme Court's analysis of statutory interpretation in *NLRB v. Scrivener*, which held that "the language of a statute should not be read strictly, but should 'be read more broadly' if such a reading was also consistent with the 'purpose and objective' of the prohibition made illegal by the statute." *Id.* at 545 (quoting *NLRB v. Scrivener*, 405 U.S. 117, 122, 92 S.Ct. 798, 31 L.Ed.2d 79 (1972)).

Additionally in *Mattei v. Mattei*, this Court once again chose to interpret the Title VII's anti-retaliation provision broadly, as to prohibit *any kind* of adverse action. 126 F.3d 794, 798 (6th Cir.1997). There, we were asked to give meaning to the concept of discrimination as it is used in the Employee Retirement Income Security Act ("ERISA"). *Id.* The ERISA provision at issue was § 510 which made it unlawful, under certain circumstances, to "discriminate against" a participant or beneficiary. *Id.* at 797 (quoting 29 U.S.C. § 1140). The majority found guidance in Title VII's and the ADEA's interpretive use of the phrase "discriminate against," noting that neither of these Acts defined this phrase, but rather their respective provisions "are consistently interpreted . . . to forbid an employer to take *any kind* of adverse action against an individual because he has engaged in [ ] protected activity. . . ." *Id.* at 806 (emphasis in original). We concluded that because the ERISA anti-retaliation provision at issue used the same phrase ("discriminate against") as the Title VII and ADEA provisions, and was enacted after them, it was proper to assume that Congress intended for the ERISA provision "to have the same basic meaning." *Id.* at 806.

Even more recently, the Supreme Court has cautioned courts against unwarranted limitations on otherwise unambiguous statutory text. In *Desert Palace, Inc. v. Costa*, the Supreme Court rejected the approach of many circuits to limit a Title VII plaintiff's ability to receive a mixed-motive jury instruction in cases where direct evidence of discrimination had not been submitted at trial, determining that a "direct evidence" requirement "is inconsistent with the text of [42 U.S.C. § 2000e-2(m)]." 539 U.S. 90, 123 S.Ct. 2148, 2153, 156 L.Ed.2d 84 (2003). The Court reasoned, in pertinent part, that the § 2000e-2(m) "unambiguously states

that a plaintiff need only 'demonstrat[e]' that an employer used a forbidden consideration with respect to 'any employment practice.'" *Id.* On its face, "the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence." *Id.* The Court was further persuaded by a review of the term "demonstrates," which Title VII, as amended in the 1991 Civil Rights Act, defined as "to 'mee[t] the burdens of production and persuasion.'" *Id.* at 2154 (citing 42 U.S.C. § 2000e(m)). The Court added, "If Congress intended the term 'demonstrates' to require that the 'burdens of production and persuasion' be met by direct evidence or some other heightened showing, it could have made that intent clear by including language to that effect in § 2000e(m). Its failure to do so is significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances, including in other provisions of Title 42." *Id.* at 2154. *Desert Palace* is instructive, inasmuch as it cautioned courts not to read limitations into statutory language, particularly where Congress expressly limited such terms in other provisions of the same title yet declined to do so in the presently reviewed statutory provision. We are faced with precisely the same situation. Section 703(a) expressly limited the scope of "discriminate" to actions relating to the employee's "compensation, terms, conditions, or privileges of employment." Section 704(a) could just as easily have limited its scope of "discriminate," yet chose not to do so. It is abundantly clear that the lessons of *Desert Palace* dictate that we not read such limitations into § 704(a) now.

2. Administrative Agency Support

In addition to support from the statutory text and Supreme Court case law, there is administrative agency support for the

"reasonably likely to deter" view, inasmuch as the EEOC has interpreted 42 U.S.C. § 2000e-3 in this manner. While it is true that the EEOC Compliance Manual on Retaliation is not binding authority, the guidelines nevertheless "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). It is persuasive authority. According to the EEOC, an "adverse employment action" means "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." EEOC Compliance Manual Section 8, "Retaliation," ¶ 8008 (1998). Under this approach, a number of retaliatory actions which are not expressly encompassed in a "materially adverse" standard would fall into the ambit of a § 704(a) violation, so long as they are reasonably likely to deter employees from engaging in protected activity. The EEOC's test is not unlimited however, for instance, "petty slights and trivial annoyances are not actionable, as they are not likely to deter protected activity." EEOC Compliance Manual Section 8, "Retaliation," 8-14. As the Ninth Circuit observed, the focus is not on the "ultimate effects of each employment action," but rather on the "deterrent effects." *Ray*, 217 F.3d at 1243. Given the primary purposes of Title VII's anti-retaliation provision, this is where the emphasis properly lies.

3. Policy Considerations

From a policy (and logical) perspective, many factors support an interpretation of adverse employment action that extends beyond the boundaries of an employment decision that materially affects the terms and conditions of employment.

As noted above, a "materially adverse" standard would undermine the driving force behind § 704(a), which is to

maintain "unfettered access to statutory remedial mechanisms." *Robinson*, 519 U.S. at 346, 117 S.Ct. 843. This Court has similarly observed that Congress, in enacting Title VII's anti-retaliation provision, "'unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation.'" *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 543 (6th Cir.1993).

Indeed, the "materially adverse" rule would allow many types of retaliatory actions to go completely unaddressed and unpunished. For instance, the D.C. Circuit has held that negative job references to prospective employers and cancelling public events honoring an employee constitute retaliatory behavior, even though such retaliatory actions do not affect the terms and conditions of one's employment. *Passer v. Am. Chem. Soc'y*, 935 F.2d 322, 331 (D.C. Cir.1991). The "materially adverse" rule does not make clear whether such adverse behavior on an employer's part would fall within the ambit of § 704(a). It also seems to leave open the issue of retaliatory harassment. *See Causey v. Balog*, 162 F.3d 795, 803 (4th Cir.1998) (recognizing the validity of a § 704(a) retaliatory harassment claim).

Contrary to the majority's position, the Ninth Circuit's "reasonably like to deter" standard adequately addresses the many varied forms of retaliation while safeguarding against a slippery slope effect by disallowing employees from litigating trivial annoyances. The inquiry would not be whether any adverse action has been taken but whether, as a matter of law, the adverse action would deter a reasonable employee from engaging in protected activity. This ferrets out suits alleging frivolous harms, while maintaining suits for very deleterious actions such as supervisor harassment. Moreover, there are no indications that the broad rules still employed in the Ninth,

Tenth, and Eleventh Circuits[1] have opened unmanageable floodgates to aggrieved Title VII plaintiffs.

B. Why the Majority Opinion Incorrectly Rejected the "Reasonably Likely to Deter" Rule

Notwithstanding legislative, Supreme Court, and administrative support for a broad rule, the majority rejects the "reasonably likely to deter" standard, citing reasons that are less than persuasive. The majority suggests that the "reasonably likely to deter" standard is too broad. Yet the rule is no broader than the statutory language requires; nor is it any broader than that which is utilized in tort cases, which often involves a "case-by-case" analysis when compelling courts to employ a "reasonable person" standard in determining what constitutes a duty of care. The reasonable person standard is readily understandable, is not burdensome and is commonly used in legal discourse.[2]

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[1] *See Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir.1997) (holding that negative job references are actionable under § 704(a)); *Ray*, 217 F.3d at 1243; *Jeffries v. Kansas*, 147 F.3d 1220, 1231-32 (10th Cir.1998) (holding that, "[i]n recognition of the remedial nature of Title VII, the law in this circuit liberally defines adverse employment action" and "takes a case-by-case approach to determining whether a given employment action is 'adverse'"); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984-86 (10th Cir.1996) (construing Title VII's anti-retaliation provision to protect an employee from a malicious prosecution action brought by a former employer); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir.1998) (holding that negative job evaluations, demotions, suspensions, disadvantageous transfer and toleration of harassment may be actionable as a retaliation claim).

[2] *Cf. Morris v. Wal-Mart Stores, Inc.*, 330 F.3d 854 (6th Cir.2003) (holding, under Tennessee law, that the reasonable person standard is utilized to determine whether or not sufficient evidence exists when contemplating a directed verdict motion in a res ipsa loquitur negligence case); *U.S. v. Jones*, 335 F.3d 527 (6th Cir.2003) (employing a reasonable person standard when adjudicating the presence of apparent authority to determine whether entry was consensual in a Fourth Amendment context);

In fact, this Court, in *Thaddeus-X v. Blatter*, previously embraced such an objective standard which the majority now claims to be unreasonable. 175 F.3d 378, 396 (6th Cir.1999) (en banc). In *Thaddeus-X*, a case involving a § 1983 action brought by the state inmates against prison officials based on alleged retaliation, we adopted an objective standard in determining what constitutes an "adverse action." *Id.* at 396. In determining "whether actions of lesser severity merit being deemed 'adverse' for purposes of a retaliation claim, we adopt[ed] the standard suggested by Judge Posner in *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir.1982), that an adverse action is one that would 'deter a person of ordinary firmness' from the exercise of the right at stake." *Id.* We reasoned that "[t]he benefits of such a standard are that it is an objective inquiry, capable of being tailored to the different circumstances in which retaliation claims arise, and capable of screening [out] the most trivial of actions from constitutional cognizance." *Id.* at 398.

Moreover, The Ninth, Tenth, and Eleventh Circuits all employ such an objective standard, specifically in the Title VII context, and by so doing, none of the Circuits appear to have had any difficulty in determining what is adverse and what is frivolous. *See, e.g., Doe v. Dekalb County School Dist.*, 145 F.3d 1441, 1449 (11th Cir.1998) (taking an "objective approach" to its case-by-case standard).

Furthermore, retaliation requires a broad rule because retaliation can take many forms, perhaps more than Congress at the time of its drafting could think of or reasonably anticipate. Nevertheless, it is not the function of this Court to graft its own policy values onto a statute; rather, it is this

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FiveCAP, Inc., v. National Labor Relations Board, 294 F.3d 768, 786 (6th Cir.2002) (employing the objective "reasonable person" standard when determining whether or not work conditions are so "unbearable" as to violate § 8(a)(3) of the National Labor Relations Act).

Court's responsibility to discern Congress' legislative intent in enacting the statute. In other words, we must determine whether Congress, not this Court, would envision a plaintiff like Sheila White receiving relief from the retaliatory actions allegedly perpetrated against her by Burlington Northern. Congress' intent is manifest: to provide employees who have been victimized by discrimination with access to appropriate statutory remedies under Title VII. *Robinson*, 519 U.S. at 346, 117 S.Ct. 843.

The majority's approach would utilize the same standard for §§ 703 and 704 so that it would not be necessary to undertake individual reviews under the separate sections of the statute when cases arise. This approach similarly is unavailing since Title VII's statutory language indicates that Congress *intended* for courts to treat general discrimination differently than retaliatory discrimination. Indeed, the recent Supreme Court case of *Desert Palace* emphasized the importance of statutory construction and the significance of statutory language as the starting point for a court's analysis. 123 S.Ct. at 2153. Moreover, different purposes are involved here and it is logical that the two sections would be treated differently. Section 703(a) of Title VII never expected to shield protected groups from every little slight they encounter; its purpose was to assist in getting discriminated-against plaintiffs into the American workforce and to keep them there. As far as retaliation is concerned, congressional intent was clear: to provide "unfettered access to statutory remedial mechanisms." *Robinson*, 519 U.S. at 346, 117 S.Ct. 843.

Contrary to the majority's suggestion, the rule on adverse employment actions to which the majority opinion adheres is quite ambiguous. In an attempt to obviate the need for a court's case-by-case determination of what actions by an employer would be "reasonably likely to deter" an employee from engaging in protected activity, the majority points to this Court's case law regarding what constitutes a "material

adverse employment action." The majority relies on *Kocsis v. Multi-Care Management, Inc.*, which requires courts to look to "indices unique to a particular situation," when considering whether or not an employment action is materially adverse. 97 F.3d 876, 886 (6th Cir.1996). This approach ultimately requires a case-by-case review to determine what is "unique" and what is not in each "particular situation." Accordingly, if the goal is to provide guidance while making individual review obsolete, it would be more advantageous to utilize a better defined inquiry than that of *Kocsis* "indices unique to a particular situation." This is particularly so when there is an alternative approach available which would also advance Title VII's goal of equal access to its protections under the law. In the present case, the majority opinion concluded that the forklift transfer constituted an adverse employment action by classifying Burlington Northern's action as an example of "indices unique to a particular situation." While that may satisfactorily dispose of the present case, the majority opinion leaves unclear what other types of adverse actions would fall within the ambit of this category, absent a better delineation of the category. As a result, employers like Burlington Northern could continue to hide behind mere technicalities and claim that other deleterious harms not encompassed in today's ruling, such as employer-sanctioned retaliatory harassment, do not qualify as adverse employment actions when the employee does not experience a demotion or a material change of duties.

The majority suggests that the EEOC's position, in advocating the "reasonably likely to deter" standard, is inconsistent with its concession that legally cognizable adverse action should not encompass trivial slights. Yet no inconsistency is apparent. It is logical that a person pursuing solutions prescribed by EEOC standards would reasonably expect some backlash, in the form of a limited number of negative consequences, some unhappy colleagues and perhaps even some ostracism. The EEOC's recommendation,

however, allows redress only for those plaintiffs who can show that such retaliatory actions would reasonably deter the charging party from engaging in protected activity. EEOC Compliance Manual § 8, "Retaliation," ¶ 8008 (1998). The majority essentially seeks to dismiss the EEOC's approach because it supposedly lacks safeguards against trivial and petty allegations; however, by purporting to exclude trivial and unsubstantiated allegations in order to define the "adverse-employment-action element" narrowly so as not to frustrate the purpose of Title VII, the majority actually impedes Title VII's effectiveness.

Moreover, the majority suggests that the "materially adverse" requirement, "properly interpreted . . . accomplishes [§ 704(a)'s purposes] while appropriately counterbalancing the need to prevent lawsuits based upon trivialities" and that the "indices . . . unique to a particular situation" standard accurately captures all other non-trivial actions taken against the employee. Yet *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir.1999), which utilized the "materially adverse" standard, rejected the employee's argument that her unwarranted negative job evaluation constituted an adverse employment action simply because it was not accompanied by monetary loss or anything else falling into the penumbra of adverse actions listed in *Kocsis*, 97 F.3d at 886. In other words, the "materially adverse" standard was ineffective in *Hollins*, because a negative job evaluation is *not* trivial; it is tangible. It is a black mark on one's record that can have severe future consequences for an employee, inasmuch as an employer can use the unwarranted negative job evaluation to deny the employee future promotions. Similarly, it leaves unaddressed such other deleterious harms such as employer-sanctioned retaliatory harassment. The *Hollins* court made no attempt to utilize the "unique indices" category in order to afford the plaintiff relief. 188 F.3d at 662.

What the majority evidently intends (but fails to state expressly) is that it is unwilling to consider actionable a wide

variety of non-trivial, tangible adverse employment actions in order to limit the number of legitimate, legally cognizable claims that can be filed by aggrieved employees. There is no other apparent reason for its analysis.

Finally, the majority also attempts to rely in part on the Supreme Court decision, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). However, such reliance is also misplaced. In *Burlington*, the Supreme Court, in devising an agency principle to govern employer liability for a supervisor's harassment of an employee, observed that an employer is always liable for a discriminatory "tangible employment action." The Court distinguished tangible employment actions from actions not obviously attributable to the employer, defining tangible employment actions as "the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Id.* at 762, 118 S.Ct. 2257. A tangible employment action "requires an official act of the enterprise, a company act," and would include such acts "as discharge, demotion, or undesirable reassignment." *Id.* at 765, 118 S.Ct. 2257. Elsewhere in the opinion the Court observed that "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington*, 524 U.S. at 761, 118 S.Ct. 2257. However, *Burlington* addressed Title VII's § 703(a), not § 704(a) and, as discussed earlier, the respective scopes of § 703(a) and 704(a) necessarily differ.[3]

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[3] The Ninth Circuit in *Ray v. Henderson* found defendant's reliance on *Burlington* similarly misplaced when advocating that Title VII qualifies the type of employment actions that would constitute an "adverse" action. 217 F.3d at 1242, n. 5. The Court stated that *Burlington* did not set forth a standard for adverse employment actions in the anti-retaliation context. *Id.*

C. Conclusion

In 1999, a panel of this Court held that an adverse employment action, for purposes of a Title VII retaliation claim, must materially affect the terms and conditions of the plaintiff's employment. *Hollins*, 188 F.3d at 662. Our grant of the petition for rehearing *en banc* provided this Court with an opportunity to reconsider the validity of *Hollins*' unreasoned importation of § 703(a)'s definition of an "adverse employment action" into § 704(a) and to clarify what actions are sufficiently adverse with respect to retaliation claims. A traditional statutory analysis and recognition of Title VII's legislative intent does not dictate the majority's continuing adherence to the "materially adverse" standard, and the rule set forth by the majority fails to provide the clarity desperately needed in this pervasive area of litigation. The lack of clarity in the majority's approach could result in more court decisions against true victims of § 704(a) retaliation because the employer's retaliatory actions conveniently manage to elude the confines of the "materially adverse" definition. Instead of following the majority approach, I would hold that the retaliatory actions Burlington Northern took against White constituted adverse employment actions because such actions are reasonably likely to deter an employee from engaging in protected activity.

SUTTON, Circuit Judge, concurring in part and dissenting in part.

I agree with the majority's treatment of "adverse employment actions" under Title VII, and accordingly join Parts I-III of its opinion in full. I respectfully dissent, however, from the majority's resolution of the punitive damages issues, and accordingly write separately to explain my disagreement with Parts IV-V of the Court's opinion.

At the trial in this case, the district court instructed the jury that it may award punitive damages under Title VII only if

the plaintiff proved that she was entitled to them by "clear and convincing" proof. In arguing that the district court erred in this respect and in contending that a punitive damages claim may be proved by a "preponderance" of the evidence under Title VII, the plaintiff relies on two United States Supreme Court decisions and one court of appeals decision. Whether considered together or singly, however, these cases do not support the plaintiff's position.

The first case, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003), holds that "circumstantial" evidence, in addition to "direct" evidence, may be used to prove discrimination in a Title VII mixed-motive case. That holding, however, does not answer today's question since circumstantial evidence may be used to prove facts in cases that require a preponderance of the evidence *and* cases that require proof beyond a reasonable doubt, including criminal cases. *See id.* at 2154 ("[W]e have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required."). In reaching its circumstantial-evidence conclusion, it is true, *Desert Palace* noted that Congress's "failure" to specify that only "direct" evidence could be used to prove discrimination was "significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances, including in other provisions of Title 42." *Id.* But that mode of analysis bears on our inquiry only if punitive damages represent a form of conventional relief in the same way that circumstantial evidence represents a form of conventional proof. In my view, that is not the case and accordingly *Desert Palace* does not advance the point. If punitive damages are not a conventional remedy, Congress's "failure" to speak to the question would suggest that the burden of proof traditionally applied to unconventional remedies in general or punitive damages in particular should be used.

Two months before the Court decided *Desert Palace*, it made clear that punitive damages are not a conventional remedy. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 1519-20, 155 L.Ed.2d 585 (2003), the Court explained that punitive damages and compensatory damages "serve different purposes," that punitive damages "are aimed at deterrence and retribution" and "serve the same purposes as criminal penalties," and that special constitutional rules of review apply to such awards. If there is a lesson to be drawn from *Desert Palace* and *State Farm*, it would seem to be that a punitive damages claim represents an unconventional form of relief, which deserves a heightened rather than a run-of-the-mill standard of proof.

The two other cases upon which the plaintiff relies are no more helpful in establishing that a preponderance standard applies to punitive damages claims. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion), also concerned an issue of conventional relief (namely, the quantum of proof in Title VII mixed-motive cases), not an issue related to punitive damages. *Id.* at 253, 109 S.Ct. 1775 ("Only rarely have we required clear and convincing proof where the action defended against seeks only conventional relief."). In saying that "[c]onventional rules of civil litigation generally apply in Title VII cases," *id.*, the plurality of course did not establish that these conventional rules apply to requests for unconventional relief, and if anything suggested just the opposite.

Karnes v. SCI Colorado Funeral Services, Inc., 162 F.3d 1077 (10th Cir.1998), is even less helpful. In that case, the defendant argued that the higher burden of proof for punitive damages claims *under Colorado law* should apply to Title VII claims. The court disagreed, concluding that state law does not control the answer to the question, then summarily (and mistakenly) relied on *Price Waterhouse* to say that a preponderance standard applies. *Id.* at 1080-81.

It is one thing, I recognize, to say that the cited cases do not answer the question; it is another to determine the answer. In the plaintiff's defense, the statute does not give us a lot to work with in determining what Congress meant. As an initial matter, the statute itself fails to specify a burden of proof, stating only that a plaintiff may recover punitive damages if she "demonstrates" that the defendant intentionally engaged in discriminatory practices. 42 U.S.C. § 1981a(b)(1). In a later subchapter, Congress defines "demonstrates" unhelpfully to mean "meets the burdens of production and persuasion," *id.* § 2000e(m), a definition that chases the tail of the initial inquiry. Nor does the context in which the relevant words appear or the legislative history to the Civil Rights Act of 1991 offer any other insights into the appropriate burden of proof. Pub.L. No. 102-166, § 102, 105 Stat. 1072.

Under these circumstances, it is appropriate to consider other indicators of statutory meaning, analogous Supreme Court precedents and relevant state laws predating the legislation. *See Steadman v. SEC*, 450 U.S. 91, 95, 101 S.Ct. 999, 67 L.Ed.2d 69 (1981) ("Where Congress has not prescribed the degree of proof which must be adduced ... this Court has felt at liberty to prescribe the standard, for '[i]t is the kind of question which has traditionally been left to the judiciary to resolve.'") (quoting *Woodby v. INS*, 385 U.S. 276, 284, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966)); *see also North Star Steel Co. v. Thomas*, 515 U.S. 29, 34, 115 S.Ct. 1927, 132 L.Ed.2d 27 (1995) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [our] precedents . . . and that it expect[s] its enactment[s] to be interpreted in conformity with them.") (citations and quotations omitted); *Nishikawa v. Dulles*, 356 U.S. 129, 135, 78 S.Ct. 612, 2 L.Ed.2d 659 (1958) (requiring a clear and convincing standard of proof for voluntary expatriation in the absence of congressional guidance and in the light of analogous Supreme Court precedents); *cf.*

Santosky v. Kramer, 455 U.S. 745, 769, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) ("A majority of the States have concluded that a 'clear and convincing evidence' standard of proof strikes a fair balance [in parental-rights termination cases]. We hold that such a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process."); *Addington v. Texas*, 441 U.S. 418, 431-32, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) ("We note that 20 states, most by statute, employ the standard of 'clear and convincing' evidence; 3 states use 'clear, cogent, and convincing' evidence; and 2 states require 'clear, unequivocal and convincing' evidence.") (footnotes and emphasis omitted).

By 1991, when Congress authorized punitive damages in Title VII claims, two Supreme Court cases had intimated that a clear and convincing standard ought to apply to punitive damages claims. In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), decided before Congress amended Title VII, the Court noted that "[t]here is much to be said in favor of a State's requiring, as many do, a standard of 'clear and convincing evidence' or, even, 'beyond a reasonable doubt'" for punitive damages. *Id.* at 23 n. 11, 111 S.Ct. 1032 (citations omitted). Two years earlier, Justice Brennan noted that exceptions exist to the preponderance of the evidence standard "when the government seeks to take unusual coercive action—action more dramatic than entering an award of money damages or other *conventional relief*." *Price Waterhouse*, 490 U.S. at 253, 109 S.Ct. 1775 (plurality opinion) (emphasis added).

In analogous settings before 1991, the Supreme Court also had adopted a clear and convincing evidence standard for civil cases involving unconventional relief—in the face of congressional silence about the appropriate burden of proof. In *Woodby v. INS*, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966), the Supreme Court observed that "Congress ha[d]

not addressed itself [in the Immigration and Nationality Act] to the question of what degree of proof is required in deportation proceedings," then observed that this is "the kind of question which has traditionally been left to the judiciary to resolve." *Id.* at 284, 87 S.Ct. 483. Reasoning that deportation proceedings fall somewhere between ordinary civil litigation and criminal litigation, the Court held that "clear, unequivocal, and convincing evidence" must support a deportation order—the same burden used in analogous cases involving civil fraud, expatriation, adultery, illegitimacy, lost wills and oral contracts. *Id.* at 285 & n. 18, 87 S.Ct. 483. *Compare Nishikawa*, 356 U.S. at 135, 78 S.Ct. 612 (holding that, in the face of congressional silence on the question, proof of an act of expatriation must be by clear and convincing evidence), *with Vance v. Terrazas*, 444 U.S. 252, 265, 100 S.Ct. 540, 62 L.Ed.2d 461 (1980) (upholding a preponderance of the evidence standard specified by Congress after *Nishikawa*).

Supreme Court decisions analogizing punitive damages to criminal penalties also suggest that a higher burden of proof ought to apply here. *See State Farm*, 123 S.Ct. at 1519-20 ("[P]unitive damages . . . are aimed at deterrence and retribution," and "serve the same purposes as criminal penalties."); *id.* at 1521 ("It should be presumed that a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability . . . is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981) ("Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor.").

For like reasons, the factual predicate for a punitive damages award—that the defendant acted with "malice" or "reckless indifference," *see* 42 U.S.C. § 1981a(b)(1)—has a

stigmatizing effect that deserves more evidentiary certainty than the preponderance standard provides. *See State Farm*, 123 S.Ct. at 1521 ("[P]unitive damages should only be awarded if the defendant's culpability is [ ] *reprehensible*.") (emphasis added); *Addington*, 441 U.S. at 424, 99 S.Ct. 1804 ("One typical use of the [clear and convincing] standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant ... [to] reduce the risk to the defendant of having his reputation tarnished erroneously."); *see also Haslip*, 499 U.S. at 54, 111 S.Ct. 1032 (O'Connor, J., dissenting) ("[P]unitive damages are quasi-criminal punishment. Unlike compensatory damages . . . punitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible. Hence, there is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award.").

By 1991, the supreme courts or legislatures of 29 States had directly addressed the issue whether punitive damage claims required a heightened burden of proof. Of those States, 20 of them chose the clear and convincing standard for all punitive damages claims, one State (Colorado) applied the beyond a reasonable doubt standard to these claims and two States (Florida and Oklahoma) applied the clear and convincing standard when the punitive award was a specific multiple of the actual damages in the case. *See* App. A (identifying the burden of proof in each State with respect to punitive damages in 1991). *See also* Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 Am. U.L.Rev. 1269, 1278 n. 63 (1993) (identifying States with a clear and convincing standard in 1993).

When Congress addressed this issue in 1991, it also was doing so in the context of a modern trend in favor of the higher standard—a trend that was well underway before the

1991 amendments to Title VII. The American Bar Association recommended the higher standard in 1986. *See* Special Committee on Punitive Damages, *Punitive Damages: A Constructive Examination*, 1986 A.B.A. Sec. Litig. 33 ("Because one of the purposes of punitive damages is punishment . . . [t]he committee concludes [ ] that the 'clear and convincing' burden of proof is appropriate for an award of punitive damages. This is the standard often used in fraud cases, to which there is some analogy."). The American Law Institute did the same in 1991. *See* 2 American Law Institute, *Reporters' Study: Enterprise Responsibility for Personal Injury* 264 (1991) ("An enterprise should be liable for punitive damages only when there is clear and convincing evidence of reckless disregard for the safety of others in the decisions made by management officials or other senior personnel."). As of today, the supreme courts or legislatures from 34 States have addressed the burden of proof issue, with 31 now requiring a heightened burden of proof. *See* App. B (identifying the burden of proof for punitive damages in each State as of 2004).

The States within the Sixth Circuit, moreover, are nearly uniform in applying a clear and convincing standard. By 1991, Ohio and Kentucky had established the standard by statute, and Tennessee did so by court decision in 1992. *See* App. A. Although the Michigan courts have not directly addressed the issue, at least one state appeals court has approved, without discussion, a jury instruction requiring proof by a preponderance of the evidence for an award of exemplary damages. *Green v. Evans*, 156 Mich.App. 145, 401 N.W.2d 250, 252 (1985). *But see Kewin v. Mass. Mut. Life Ins. Co.*, 409 Mich. 401, 295 N.W.2d 50, 55 (1980) (noting that exemplary damages serve only to compensate plaintiffs for "humiliation, sense of outrage, and indignity"—and may not serve as punishment to the defendant).

While there may not be a Rosetta Stone to guide us here, Supreme Court precedents concerning punitive damages and comparable forms of relief, as well as relevant state-law practices, suggest that a clear and convincing standard of proof ought to govern these claims. A claim for punitive damages, in a nutshell, is more akin to claims concerning fraud, deportation and expatriation, oral contracts and illegitimacy than it is to more conventional civil claims. Accordingly, the heightened burden of proof associated with these claims and traditionally associated with punitive damages claims in general ought to apply.

The additional citations identified by the majority in support of the plaintiff's position do not alter this analysis. *Smith v. Wade,* 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983), deals with whether actual malice is required to obtain punitive damages under § 1983, not with the preponderance/clear and convincing debate raised here. *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2d Cir.1990), involved a products liability claim under New York law, in which the defendant argued that the Due Process Clause of the United States Constitution *requires* a clear and convincing standard. In rejecting that argument, the court "acknowledg[ed] the force of the argument that since punitive damages are awarded primarily to punish a defendant for past conduct and to deter it and others from similar conduct in the future, a standard of proof appropriate for 'quasi-criminal wrongdoing' should be required." *Id.* at 282.

In re Exxon Valdez, 270 F.3d 1215 (9th Cir.2001), is an admiralty-law decision in which the Ninth Circuit concluded that the district court did not "abuse its discretion" in applying a preponderance standard to a punitive damages claim. *Id.* at 1232-33. Again, the primary debate in the case was whether the Due Process Clause required a higher standard. Moreover, if like the Ninth Circuit we applied an abuse of discretion to this issue (which we do not), it no

doubt would be a very different question whether the district court in this case abused its discretion in imposing the higher standard of proof. The Fourth Circuit's decision in *Notter v. North Hand Protection*, 89 F.3d 829, 1996 WL 342008 (4th Cir. June 21, 1996), besides being unpublished, rejects only one argument by the employer in that case—that the higher burden of proof for punitive damages claims *under state law* should control the Title VII inquiry. *Id.* at *10. And the Harvard Law Review piece supports the employer's position in this case. In addition to approving "measures that guide and direct juries toward appropriate [ ] determinations," it notes that "the widespread acceptance of the clear and convincing evidence standard demonstrates [the] states' acknowledgment of the retributive function of punitive damages." *Jury Determination of Punitive Damages*, 110 Harv. L.Rev. 1513, 1532-33, 1536 (1997).

Nor does the cap on punitive damages claims under Title VII advance plaintiff's argument. While a cap on punitive damages addresses one issue in this area (the outer limits of awards), it does not account for the other issues in this area—the appropriate quantum of proof required (1) before a jury may attach a "reprehensibility" label to another's conduct, *State Farm*, 123 S.Ct. at 1521, or (2) before a jury may award punitive damages that have a significant ratio to the underlying compensatory award. In ascertaining the constitutional limits of punitive damages, it is the ratio of the two awards, not the size of the punitive damages award, that the Supreme Court considers in measuring the award's compliance with Due Process—which is why awards under $300,000 may still violate the Constitution and why they still deserve the prevailing burden of proof for punitive damages claims in this country, namely clear and convincing evidence. *See id.* at 1524 (ratios involving "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1")

(citation omitted); *see also Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1049 (8th Cir.2002) (reducing punitive damages award from $120,000 to $60,000 to correct constitutional deficiency); *Tyson Foods, Inc. v. Stevens*, 783 So.2d 804, 810 (Ala.2000) ("In this case, the punitive-damages award of $75,000 is 30 times the compensatory-damages award of $2,500. Considering the facts before us, we find the ratio of 30:1 to be unreasonable."); *Employees' Benefit Ass'n v. Grissett*, 732 So.2d 968, 979 (Ala.1998) ("The punitive award of $150,000 is 170 times the compensatory award of $880. That 170:1 ratio is unacceptable.").

But that is not the most significant problem with invoking the damages cap in this instance. All agree that Congress did not give the courts particularly helpful guidance here, requiring us to answer what the burden of proof for a federal punitive damages claim should be in the face of congressional silence. An answer that says punitive damages claims receive a preponderance standard when the award is under $300,000 but receive a clear and convincing standard when the award is some higher amount to be named later does not seem very helpful. Neither do I understand how the damages cap could make a difference in the outcome of this case. If, in this instance, the Court had concluded that a clear and convincing standard generally applies to punitive damages claims in the face of congressional silence, the existence of a cap of this sort by itself could not alter the presumption. If instead the Court had concluded that a preponderance standard generally applies in this setting, the existence of a damages cap would make no difference at all. Either way, in other words, the outcome would be unaffected by the existence of the cap.

I have one other qualm with the majority's decision on this point—which is reaching the burden of proof issue at all. I do not understand how White could prevail on remand in a punitive-damages-only trial, no matter what the burden of persuasion is. Because we required an en banc hearing to

decide whether White suffered an adverse employment action and, notably, to determine whether this Circuit embraced the ultimate-employment-decision test, it would not seem possible for a jury to conclude that Burlington Northern acted with reckless disregard for White's federally-protected rights in imposing the *suspension*. *See* 42 U.S.C. § 1981a(b)(1) (requiring proof that the employer "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual"); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999) ("The terms 'malice' or 'reckless indifference' pertain to the employer's *knowledge* that it may be acting in *violation of federal law*, not its awareness that it is engaging in discrimination.") (emphasis added); *id.* at 537, 119 S.Ct. 2118 (recognizing that imposing punitive damages would be inappropriate when "[t]he underlying theory of discrimination [is] novel or otherwise poorly recognized").

A punitive damages claim with respect to the *transfer* count is even harder to imagine. Until now, no Sixth Circuit case (to my knowledge) has found a cognizable Title VII claim arising from a lateral transfer, let alone a transfer *within* an employee classification and without a loss in pay. *See Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir.1996) ("[R]eassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims.") (citing *Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir.1987)). While the opinion concludes that this transfer count is cognizable under Title VII, its reasons for doing so could not support a finding that Burlington Northern acted with "malice" or "reckless indifference" to White's rights.

For these reasons, I respectfully dissent from Parts IV and V of the Court's opinion.

APPENDIX A

State Burdens of Proof for Punitive Damages in 1991

By 1991, the supreme courts or legislatures of the following States had adopted a higher burden of proof for awarding punitive damages:

Alabama	Ala. Code § 6-11-20(a) (1991) (clear and convincing evidence).
Alaska	Alaska Stat. § 09.17.020 (1991) (clear and convincing evidence).
Arizona	*Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 680-81 (Ariz. 1986) ("[W]hile a plaintiff may collect compensatory damages upon proof by a preponderance of the evidence of his injuries due to the tort of another, we conclude that recovery of punitive damages should be awardable only upon clear and convincing evidence of the defendant's evil mind.").
California	Cal. Civ. Code § 3294(a) (1991) (clear and convincing evidence).
Colorado	Colo. Rev. Stat. § 13-25-127(2) (1991) (beyond a reasonable doubt).
Florida	Fla. Stat Ann. § 768.73(1)(b) (1991) (punitive damages exceeding three times actual damages must be proved by clear and convincing evidence).
Georgia	Ga. Code Ann. § 51-12-5.1(b) (1991) (clear and convincing evidence).
Hawaii	*Masaki v. Gen. Motors Corp.*, 780 P.2d 566, 575 (Haw. 1989) ("[F]or all punitive damage claims we adopt the clear and convincing standard of proof.").

Indiana	Ind. Code § 34-4-34-2 (1991) (clear and convincing evidence).
Iowa	Iowa Code § 668A.l(1)(a) (1991) (clear and convincing evidence).
Kansas	Kan. Stat. Ann. § 60-3702(c) (1991) (clear and convincing evidence).
Kentucky	Ky. Rev. Stat. Ann. § 411.184(2) (1991) (clear and convincing evidence).
Maine	*Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985) ("[W]e hold that a plaintiff may recover exemplary damages based upon tortious conduct only if he can prove by clear and convincing evidence that the defendant acted with malice.").
Minnesota	Minn. Stat. § 549.20(1)(a) (1991) (clear and convincing evidence).
Montana	Mont. Code Ann. § 27-1-221(5) (1991) (clear and convincing evidence).
Nevada	Nev. Rev. Stat. 42.005(1) (1991) (clear and convincing evidence).
North Dakota	N.D. Cent. Code § 32-03.2-11 (1991) (clear and convincing evidence).
Ohio	Ohio Rev. Code Ann. § 2315.21(C)(3) (1991) (clear and convincing evidence).
Oklahoma	Okla. Stat. tit. 23 § 9.1.A (1991) (punitive damages exceeding the amount of actual damages must be proved by clear and convincing evidence).
Oregon	Or. Rev. Stat. § 41.315(1) (1991) (clear and convincing evidence).

South Carolina	S.C. Code Ann. § 15-33-135 (1991) (clear and convincing evidence).
Utah	Utah Code Ann. § 78-18-1(1)(a) (1991) (clear and convincing evidence).
Wisconsin	*Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 458 (Wis. 1980) ("We hold that the [clear, satisfactory and convincing evidence] burden of proof shall apply to punitive damages claims hereafter.").

By 1991, the supreme courts or legislatures of the following States had rejected a higher burden of proof for awarding punitive damages:

Connecticut	*Freeman v. Alamo Mgmt. Co.*, 607 A.2d 370, 375 (Conn. 1992) ("We disagree . . . with the . . . conclusion . . . that clear and convincing proof is an appropriate standard of proof whenever claims of tortious conduct [such as those involving punitive damages] have serious consequences or harsh or far-reaching effects on individuals or require the proof of willful, wrongful and unlawful acts.").
Idaho	Idaho Code § 6-1604(1) (1991) (preponderance of the evidence).
Mississippi	*Gaylord's of Meridian, Inc. v. Sicard*, 384 So. 2d 1042, 1045 (Miss. 1980) ("Although the damages are by way of penalizing the defendant against whom they are sought, the proof is by a preponderance of the evidence rather than beyond a reasonable doubt.") *overruled on other grounds by C & C Trucking Co. v. Smith*, 612 So. 2d 1092, 1105-06 (Miss. 1992); *Andrew Jackson Life*

Ins. Co. v. Williams, 566 So. 2d 1172, 1188 (Miss. 1990) ("[T]he law requires a finding of 'bad faith-*plus*'—based upon a preponderance of the evidence—before punitive damages may be awarded.").

Missouri — *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 75 (Mo. 1990) ("The defendant argues that punitive damage submissions should require 'clear and convincing' evidence. This requirement is contrary to our normal requirements in the submission of civil cases. We are not disposed so to hold, or to follow cases from other jurisdictions so holding.").

New Mexico — *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 709 P.2d 649, 654 (N.M. 1985) ("It is the general rule . . . that issues of fact in civil cases are to be determined according to the preponderance of the evidence . . . . We are not convinced that the degree of proof should be changed [to require clear and convincing evidence] in punitive damage areas.").

South Dakota — *Flockhart v. Wyant*, 467 N.W.2d 473, 475 (S.D. 1991) ("[S.D. Codified Laws § 21-1-4.1] does *not* establish a clear and convincing evidence standard but merely requires clear and convincing evidence to show a *reasonable* basis [to believe the defendants committed acts warranting punitive damages]. The clear and convincing language merely modifies the 'reasonable basis' language to make a prima facie showing that punitive damages *may* be in order.").

By 1991, the supreme courts and legislatures of the following States had yet to address the question whether claims for punitive damages require a heightened burden of proof, though (as noted below) some lower courts had addressed the issue and some supreme courts had mentioned, without discussing, jury instructions requiring a preponderance of the evidence:

Arkansas	*Nat'l Bank of Commerce v. McNeill Trucking Co., Inc.*, 828 S.W.2d 584, 591 (Ark. 1992) (Dudley, J., concurring) ("I would hope that the possible changes discussed in this opinion [*i.e.* the adoption of a clear and convincing standard for punitive damages] might be brought before this court in an adversarial manner . . . . It is a matter which we have never addressed.").
Delaware	*Cloroben Chem. Corp. v. Comegys*, 464 A.2d 887, 891-92 (Del. 1983) ("We now turn to Cloroben's contention that the jury improperly awarded punitive damages in that they were not supported by a preponderance of the evidence . . . . Our review of the record indicates that there is sufficient evidence to support a finding . . . [and] we must reject the argument that there was insufficient evidence to support an award of punitive damages."); *Guthridge v. Pen-Mod, Inc.*, 239 A.2d 709, 715 (Del. Super. Ct. 1967) (instructing the jury that "[p]unitive damages may be awarded only if the jury finds by a preponderance of the evidence that the defendants' actions were motivated by some form of malice.").

Illinois	*Illinois Terminal R.R. Co. v. Thompson*, 71 N.E. 328, 333 (Ill. 1904) (approving a jury instruction that "left it to the discretion of the jury to impose whatever damages they might choose, even to the extent of allowing punitive damages" by a preponderance of the evidence).
Louisiana	*Galjour v. Gen. Am. Tank Car Corp.*, 764 F. Supp. 1093, 1100-01 (E.D. La. 1991) ("In fact, there are no Louisiana cases which specifically discuss the appropriate burden of proof for exemplary damages . . . . The defendants' argument that a heightened burden of proof should apply to exemplary damages is not without merit, as shown by recent legislative enactments in other jurisdictions, but it is not the law in Louisiana. Until the Louisiana legislature takes action to raise the burden, the law is that the burden of proof for exemplary damages is by a preponderance of the evidence.") (footnote omitted); *see also Int'l Harvester Credit Corp. v. Seale*, 518 So. 2d 1039, 1041 (La. 1988) ("Under Louisiana law, punitive or other 'penalty' damages are not allowable unless expressly authorized by statute.").
Maryland	*Gorman v. Sabo*, 122 A.2d 475, 479 (Md. 1956) ("There is no doubt that punitive damages may be recovered in [this] case. . . . The applicable law was correctly put to the jury by the trial court in his charge. He told them the Sabos must prove their case 'by a fair preponderance of the evidence.'") (citation omitted); *Thorne v.*

Contee, 565 A.2d 102, 108 (Md. Ct. Spec. App. 1989) ("In order for the issue of punitive damages to go to the jury, Thorne must have produced sufficient evidence of Contee's wanton or reckless conduct to meet the preponderance of the evidence test"), *cert. denied*, 569 A.2d 643 (Md. 1990); 569 A.2d 1242 (Md. 1990).

Massachusetts *Santos v. Chrysler Corp.*, No. 921039, 1996 WL 1186818, at *3 (Mass. Super. Ct. Sept. 18, 1996) ("Chrysler contends that the court erred because it failed to instruct the jury that they must find by clear and convincing evidence that Chrysler was grossly negligent before they could award punitive damages. The contention is meritless. Under Massachusetts law the burden of proof in civil proceedings of this kind is satisfied 'by a fair preponderance of the evidence.'") (citation omitted), *aff'd in part and remanded on other grounds*, 715 N.E.2d 47 (Mass. 1999).

Michigan *Green v. Evans*, 401 N.W.2d 250, 252 (Mich. Ct. App. 1985) (approving, without discussing the burden of proof, a jury instruction stating: "Such exemplary damages only are recoverable if the Plaintiff has proven by a preponderance of the evidence, malice, willful and wanton misconduct or negligence so great as to indicate reckless disregard of the rights of another."). *But see Kewin v. Mass. Mut. Life Ins. Co.*, 295 N.W.2d 50, 55 (Mich. 1980) (noting that exemplary damages only serve to compensate plaintiffs for "humiliation, sense of out-

	rage, and indignity"—exemplary damages may not serve as punishment to the defendant).
Nebraska	*Distinctive Printing & Packaging Co. v. Cox*, 443 N.W.2d 566, 574 (Neb. 1989) ("[P]unitive, vindictive, or exemplary damages contravene Neb. Const. art. VII, § 5, and thus are not allowed in this jurisdiction.").
New Hampshire	New Hampshire has not addressed the burden of proof for punitive damages. *See* N.H. Rev. Stat. Ann. § 507:16 (2004) ("No punitive damages shall be awarded in any action, unless otherwise provided by statute.").
New Jersey	*Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 482 (N.J. 1986) (refusing to address the burden of proof in punitive damages cases because "the parties have not briefed or argued the issue, nor have the courts below addressed it"); *see also Jackson v. Consol. Rail Corp.*, 538 A.2d 1310, 1321 n.5 (N.J. Super. Ct. App. Div. 1988) ("Defendant also attacks the punitive damage verdict because the court in its charge did not place the burden on plaintiff to prove same by 'clear and convincing' evidence. However, that is not the present standard applicable in New Jersey.").
New York	*Greenbaum v. Handelsbanken*, 979 F.Supp. 973, 982 (S.D.N.Y. 1997) ("[T]he Court determines that until . . . higher authorities elect[] to address the question, the preponderance of the evidence standard should apply to punitive damages deliberations.").

North Carolina	*Caudle v. Benbow*, 45 S.E.2d 361, 362 (N.C. 1947) (approving, without discussing, a jury instruction requiring the jury to "first find by the preponderance of the evidence the presence of actual malice").
Pennsylvania	*Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1098 n.14 (Pa. 1985) (Hutchinson, J., delivering the judgment of the court and an opinion joined by only one of the five remaining justices) (recognizing that many jurisdictions have adopted a clear and convincing standard and concluding: "We believe the goal of limiting punitive damage awards in the context of products liability litigation is best served by focusing on the nature of the defendant's conduct instead of increasing the plaintiff burden of persuasion."); *Rizzo v. Michener*, 584 A.2d 973, 979 (Pa. Super. Ct. 1990) ("The trial judge must determine in the first instance whether the plaintiff has presented sufficient evidence to support a punitive damage claim, which requires evidence on which the jury might reasonably conclude that outrageous conduct has been established by a preponderance of the evidence."), *appeal denied*, 596 A.2d 159 (Pa. 1991).
Rhode Island	Rhode Island has not addressed the burden of proof for recovering punitive damages.
Tennessee	Tennessee first addressed the burden of proof for punitive damages in 1992 in *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 900-01 (Tenn. 1992), and held that the clear and convincing standard applies to all claims for punitive damages.

Texas	*Lawson-Avila Const., Inc. v. Stoutamire*, 791 S.W.2d 584, 594 (Tex. Ct. App. 1990) ("We . . . continue to follow the Texas precedent established by the Courts of this State and hold that the burden of proof in cases involving . . . exemplary damages is by a preponderance of the evidence [and not clear and convincing evidence]."") (internal quotations omitted), *writ of error denied* (Dec. 12, 1990).
Vermont	Vermont has not addressed the burden of proof for recovering punitive damages.
Virginia	*Peacock Buick, Inc. v. Durkin*, 277 S.E.2d 225, 227 n.3 (Va. 1981) (approving, without discussing the burden of proof, a jury instruction stating: "[I]f you believe from a preponderance of the evidence that the defendant acted wantonly, oppressively, or with such recklessness as evinced a conscious disregard of the rights of others, or with such malice as implied a spirit of mischief, or criminal indifference to civil obligations, you may award the plaintiff such additional sum as punitive damages.").
Washington	*Sintra, Inc. v. City of Seattle*, 935 P.2d 555, 566 (Wash. 1997) (holding, without addressing the burden of proof, that the trial court properly instructed the jury that it could award punitive damages on the 42 U.S.C. § 1983 claim 'only if you find [by a preponderance of the evidence] that the conduct of an individual defendant was malicious or taken in reckless disregard of plaintiffs' rights'") (alteration in original). *But see Dailey v. North Coast Life Ins. Co.*,

919 P.2d 589, 590 (Wash. 1996) ("Since its earliest decisions, this court has consistently disapproved of punitive damages as contrary to public policy.").

West Virginia *Goodwin v. Thomas*, 403 S.E.2d 13, 16 (W. Va. 1991) (reinstating an award of punitive damages, without discussing the burden of proof, based on the following jury instruction: "[I]f you find from a preponderance of all the evidence in this case, that the actions of the Defendants in evicting the Plaintiff were in total disregard of the Plaintiff's rights as a lessee in the leased premises and that such actions were willful and wanton then you may award the Plaintiff punitive damages.").

Wyoming *Campen v. Stone*, 635 P.2d 1121, 1127 (Wyo. 1981) (approving, without discussing the burden of proof, a jury instruction stating: "Punitive damages can properly be awarded . . . only if, one of the following [acts] has been proven by a preponderance of the evidence.") (internal quotations omitted).

APPENDIX B

State Burdens of Proof for Punitive Damages in 2004

As of today, the supreme courts or legislatures from the following States have adopted the higher burden of proof for awarding punitive damages:

Alabama	Ala. Code § 6-11-20(a) (2004) (clear and convincing evidence).
Alaska	Alaska Stat. § 09.17.020(b) (2004) (clear and convincing evidence).
Arizona	*Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 680-82 (Ariz. 1986) ("[W]hile a plaintiff may collect compensatory damages upon proof by a preponderance of the evidence of his injuries due to the tort of another, we conclude that recovery of punitive damages should be awardable only upon clear and convincing evidence of the defendant's evil mind."); *Saucedo ex rel. Sinaloa v. Salvation Army*, 24 P.3d 1274, 1277 (Ariz. Ct. App. 2001) ("In Arizona, to recover punitive damages, a plaintiff must prove by clear and convincing evidence that a 'defendant's wrongful conduct was guided by evil motives or wilful or wanton disregard of the interests of others.'") (citation omitted), *review denied* (Oct. 3, 2001).
California	Cal. Civ. Code § 3294(a) (2004) (clear and convincing evidence).
Colorado	Colo. Rev. Stat. § 13-25-127(2) (2004) (beyond a reasonable doubt).
Florida	Fla. Stat. Ann. § 768.725 (2004) (clear and convincing evidence).

Georgia	Ga. Code Ann. § 51-12-5.1(b) (2004) (clear and convincing evidence).
Hawaii	*Schefke v. Reliable Collection Agency, Ltd.*, 32 P.3d 52, 71 (Haw. 2001) ("Clear and convincing evidence of 'some wilful misconduct or . . . entire want of care which would raise presumption of a conscious indifference to consequences' supports an award of punitive damages.") (internal quotations omitted).
Idaho	Idaho Code § 6-1604(1) (2004) (clear and convincing evidence).
Indiana	Ind. Code § 34-51-3-2 (2004) (clear and convincing evidence).
Iowa	Iowa Code § 668A.1(1)-(2) (2004) (clear and convincing evidence).
Kansas	Kan. Stat. Ann. § 60-3702(c) (2004) (clear and convincing evidence).
Kentucky	Ky. Rev. Stat. Ann. § 411.184(2) (2004) (clear and convincing evidence).
Maine	*St. Francis De Sales Fed. Credit Union v. Sun Ins. Co. of N.Y.*, 818 A.2d 995, 1001 (Me. 2002) ("'[I]n order to recover punitive damages, a plaintiff must prove by clear and convincing evidence that the defendant acted with malice.'") (quoting *Tuttle v. Raymond*, 494 A.2d 1353, 1354 (Me. 1985)).
Maryland	*Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 657 (Md. 1992) ("[I]n *any* tort case a plaintiff must establish by clear and convincing evidence the basis for an award of punitive damages."); *Carter v. Aramark Sports and Entm't Servs., Inc.*, 835 A.2d

	262, 287 (Md. Ct. Spec. App. 2003) ("The 'clear and convincing' standard of proof applies to make out a claim for punitive damages.").
Minnesota	Minn. Stat. § 549.20(1)(a) (2004) (clear and convincing evidence).
Mississippi	Miss. Code Ann. § 11-1-65(1)(a) (2004) (clear and convincing evidence).
Missouri	*Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. 1996) ("For common law punitive damage claims, the evidence must meet the clear and convincing standard of proof."); *Hoskins v. Bus. Men's Assurance*, 116 S.W.3d 557, 564 (Mo. Ct. App. 2003) ("Punitive damages are properly submitted in a negligence [or strict liability] case only if there is clear and convincing evidence that 'at the time of the negligent act, the defendant[s] knew or had reason to know that there was a high degree of probability that the action would result in injury.'") (citation omitted).
Montana	Mont. Code Ann. § 27-1-221(5) (2004) (clear and convincing evidence).
Nevada	Nev. Rev. Stat. 42.005(1) (2004) (clear and convincing evidence).
New Jersey	N.J. Stat. Ann. § 2A:15-5.12(a) (2004) (clear and convincing evidence).
North Carolina	N.C. Gen. Stat. § 1D-15(b) (2004) (clear and convincing evidence).
North Dakota	N.D. Cent. Code § 32-03.2-11(1) (2004) (clear and convincing evidence).

Ohio	Ohio Rev. Code Ann. § 2315.21(C)(2) (2004) (clear and convincing evidence).
Oklahoma	Okla. Stat. tit. 23, § 9.1.B-.D (2004) (clear and convincing evidence).
Oregon	Or. Rev. Stat. § 18.537(1) (2004) (clear and convincing evidence).
South Carolina	S.C. Code Ann. § 15-33-135 (2004) (clear and convincing evidence).
Tennessee	*Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992) ("[A] plaintiff must prove the defendant's intentional, fraudulent, malicious, or reckless conduct by clear and convincing evidence."); *Barnett v. Lane*, 44 S.W.3d 924, 928 (Tenn. Ct. App. 2000) ("[A]n award [of punitive damages] is only appropriate when the necessary conduct has been shown 'by clear and convincing evidence.'").
Texas	Tex. Civ. Prac. & Rem. Code Ann. § 41.003(b) (2004) (clear and convincing evidence).
Utah	Utah Code Ann. § 78-18-1(1)(a) (2004) (clear and convincing evidence).
Wisconsin	*Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 458 (Wis. 1980) ("We hold that the [clear, satisfactory and convincing evidence] burden of proof shall apply to punitive damages claims hereafter."); *City of West Allis v. Wis. Elec. Power Co.*, 635 N.W.2d 873, 881 (Wis. Ct. App. 2001) ("The evidence [supporting a punitive damages award] must also be 'clear and convincing.'"), *pet. for review denied*, 643 N.W.2d 93 (Wis. 2002).

As of today, the supreme courts or legislatures from the following States have rejected a higher burden of proof for awarding punitive damages:

Connecticut	*Freeman v. Alamo Mgmt. Co.*, 607 A.2d 370, 375 (Conn. 1992) ("We disagree . . . with the . . . conclusion . . . that clear and convincing proof is an appropriate standard of proof whenever claims of tortious conduct [such as those involving punitive damages] have serious consequences or harsh or far-reaching effects on individuals or require the proof of willful, wrongful and unlawful acts.").
New Mexico	*United Nuclear Corp. v. Allendale Mut. Ins.*, 709 P.2d 649, 654 (N.M. 1985) ("It is the general rule . . . that issues of fact in civil cases are to be determined according to the preponderance of the evidence . . . . We are not convinced that the degree of proof should be changed [to require clear and convincing evidence] in punitive damages areas.").
South Dakota	*Flockhart v. Wyant*, 467 N.W.2d 473, 475 (S.D. 1991) ("[S.D. Codified Laws § 21-1-4.1] does *not* establish a clear and convincing evidence standard but merely requires clear and convincing evidence to show a *reasonable* basis [to believe the defendants committed acts warranting punitive damages]. The clear and convincing language merely modifies the 'reasonable basis' language to make a prima facie showing that punitive damages *may* be in order.").

As of today, the supreme courts and legislatures from the following States have yet to address the question whether claims for punitive damages require a heightened burden of proof, though (as noted below) some lower courts have addressed the issue and some supreme courts had mentioned, without discussing, jury instructions requiring a preponderance of the evidence:

Arkansas	*Nat'l Bank of Commerce v. McNeill Trucking Co., Inc.*, 828 S.W.2d 584, 590 (Ark. 1992) (Dudley, J., concurring) ("I would hope that the possible changes discussed in this opinion [*i.e.* the adoption of a clear and convincing standard for punitive damages] might be brought before this court in an adversarial manner . . . . It is a matter which we have never addressed.").
Delaware	*Cloroben Chem. Corp . v. Comegys*, 464 A.2d 887, 891-92 (Del. 1983) ("We now turn to Cloroben's contention that the jury improperly awarded punitive damages in that they were not supported by a preponderance of the evidence . . . . Our review of the record indicates that there is sufficient evidence to support a finding . . . [and] we must reject the argument that there was insufficient evidence to support an award of punitive damages."); *Guthridge v. Pen-Mod, Inc.*, 239 A.2d 709, 715 (Del. Super. Ct. 1967) (instructing the jury that "[p]unitive damages may be awarded only if the jury finds by a preponderance of the evidence that the defendants' actions were motivated by some form of malice.").

Illinois	*Illinois Terminal R.R. Co. v. Thompson*, 71 N.E. 328, 333 (Ill. 1904) (approving a jury instruction that "left it to the discretion of the jury to impose whatever damages they might choose, even to the extent of allowing punitive damages" by a preponderance of the evidence).
Louisiana	*Hill v. Sampson*, 628 So. 2d 81, 84 (La. Ct. App. 1993) ("While this argument has theoretical appeal, we are not inclined by these judicial means to establish 'clear and convincing evidence' as the standard of proof for exemplary damages under [Louisiana's DUI law]. In our view, had the legislature intended a higher standard of proof than that of a preponderance of the evidence, it would have clearly so indicated."); *Rivera v. United Gas Pipeline Co.*, 697 So. 2d 327, 335 (La. Ct. App. 1997) (holding that earlier interpretation of Louisiana's hazardous substance handling statute "says nothing of creating a 'clear and convincing' burden of proof, and this Court is not prepared to create one . . . . Ergo, until the Louisiana legislature takes direct action, the burden of proof for exemplary damages is by a preponderance of the evidence."), *cert. denied*, 704 So. 2d 1196, 1197 (La. 1997).
Massachusetts	*Santos v. Chrysler Corp.*, No. 921039, 1996 WL 1186818, at *3 (Mass. Super. Ct. Sept. 18, 1996) ("Chrysler contends that the court erred because it failed to instruct the jury that they must find by clear and convincing evidence that Chrysler was grossly negli-

	gent before they could award punitive damages. The contention is meritless. Under Massachusetts law the burden of proof in civil proceedings of this kind is satisfied 'by a fair preponderance of the evidence.'"), *affirmed in part and remanded on other grounds*, 715 N.E.2d 47 (Mass. 1999).
Michigan	*Green v. Evans*, 401 N.W.2d 250, 252 (Mich. Ct. App. 1985) (approving, without discussing the burden of proof, a jury instruction stating: "Such exemplary damages only are recoverable if the Plaintiff has proven by a preponderance of the evidence, malice, willful and wanton misconduct or negligence so great as to indicate reckless disregard of the rights of another"). *But see Kewin v. Mass. Mut. Life Ins. Co.*, 295 N.W.2d 50, 55 (Mich. 1980) (noting that exemplary damages only serve to compensate plaintiffs for "humiliation, sense of outrage, and indignity"—exemplary damages may not serve as punishment to the defendant).
Nebraska	*Distinctive Printing & Packaging Co. v. Cox*, 443 N.W.2d 566, 574 (Neb. 1989) ("[P]unitive, vindictive, or exemplary damages contravene Neb. Const. art. VII, § 5, and thus are not allowed in this jurisdiction.").
New Hampshire	New Hampshire has not addressed the burden of proof for punitive damages. *See* N.H. Rev. Stat. Ann. § 507:16 (2004) ("No punitive damages shall be awarded in any action, unless otherwise provided by statute.").

New York — *Greenbaum v. Svenska Handelsbanken*, 979 F. Supp. 973, 978-82 (S.D.N.Y. 1997) ("[T]he Court determines that until . . . higher authorities elect[] to address the question, the preponderance of the evidence standard should apply to punitive damages deliberations."). *Compare Munoz v. Puretz*, 753 N.Y.S.2d 463, 466 (N.Y. App. Div. 2003) ("In order to recover punitive damages, a plaintiff must show [certain conduct] by 'clear, unequivocal and convincing evidence.'") (citation omitted), *with In re Seventh Judicial Dist. Asbestos Litig.*, 593 N.Y.S.2d 685, 686-87 (N.Y. App. Div. 1993) ("The trial court properly instructed the jury that the evidentiary standard for proving entitlement to punitive damages is preponderance of the evidence, not clear and convincing evidence.").

Pennsylvania — *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1098 n.14 (Pa. 1985) (Hutchinson, J. delivering the judgment of the court and an opinion joined by only one of the five remaining justices) (recognizing that many jurisdictions have adopted a clear and convincing standard and concluding: "We believe the goal of limiting punitive damage awards in the context of products liability litigation is best served by focusing on the nature of the defendant's conduct instead of increasing the plaintiff's burden of persuasion."); *Rizzo v. Michener*, 584 A.2d 973, 979 (Pa. Super. Ct. 1990) ("The trial judge must determine in the first instance whether the plaintiff has presented sufficient evidence to support a punitive damage claim,

	which requires evidence on which the jury might reasonably conclude that outrageous conduct has been established by a preponderance of the evidence."), *appeal denied*, 596 A.2d 159 (Pa. 1991).
Rhode Island	Rhode Island has not addressed the burden of proof for recovering punitive damages.
Vermont	Vermont has not addressed the burden of proof for recovering punitive damages.
Virginia	*Peacock Buick, Inc. v. Durkin*, 277 S.E.2d 225, 227 n.3 (Va. 1981) (approving, without discussing the burden of proof, a jury instruction stating: "[I]f you believe from a preponderance of the evidence that the defendant acted wantonly, oppressively, or with such recklessness as evinced a conscious disregard of the rights of others, or with such malice as implied a spirit of mischief, or criminal indifference to civil obligations, you may award the plaintiff such additional sum as punitive damages."); *RF & P Corp. v. Little*, 40 S.E.2d 908, 914 (Va.1994) (holding that a preponderance of the evidence standard applies to a knowing and willful violation of a statute resulting in a civil fine, and the clear and convincing evidence standard applies only "to certain cases that are equitable in nature, such as suits involving fraud and misrepresentation, undue influence, [or] estoppel.").
Washington	*Sintra, Inc. v. City of Seattle*, 935 P.2d 555, 566 (Wash. 1997) (stating, without addressing the burden of proof, that the trial court properly instructed the jury that it could

	award punitive damages on a 42 U.S.C. § 1983 claim "only if you find [by a preponderance of the evidence] that the conduct of an individual defendant was malicious or taken in reckless disregard of plaintiffs' rights.") (quotation omitted and alteration in original). *But see Dailey v. North Coast Life Ins. Co.*, 919 P.2d 589, 590 (Wash. 1996) ("Since its earliest decisions, this court has consistently disapproved of punitive damages as contrary to public policy.").
West Virginia	*Goodwin v. Thomas*, 403 S.E.2d 13, 16 (W. Va. 1991) (finding sufficient evidence to support an award of punitive damages, without discussing the burden of proof, based on the following jury instruction: "[I]f you find from a preponderance of all the evidence in this case, that the actions of the Defendants in evicting the Plaintiff were in total disregard of the Plaintiff's rights as a lessee in the leased premises and that such actions were willful and wanton.").
Wyoming	*Campen v. Stone*, 635 P.2d 1121, 1127 (Wyo. 1981) (approving, without discussing the burden of proof, a proposed jury instruction stating: "Punitive damages can properly be awarded . . . only if, one of the following [acts] has been proven by a preponderance of the evidence.").

APPENDIX B

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 00-6780, 01-5024

SHEILA WHITE,
Plaintiff-Appellee/Cross-Appellant,

v.

BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY,
Defendant-Appellant/Cross-Appellee.

Argued: Sept. 11, 2002.
Decided and Filed: Nov. 13, 2002.

Before: KRUPANSKY and CLAY, *Circuit Judges*; GWIN, *District Judge.*[*]

GWIN, D.J., delivered the opinion of the court, in which KRUPANSKY, J., joined. CLAY, J. (pp. 455-461), delivered a separate dissenting opinion.

OPINION

GWIN, *District Judge.*

With this appeal, we examine whether actions taken by the Appellant Burlington Northern & Santa Fe Railway Co. ("Burlington Northern" or "railroad") were sufficiently adverse employment actions to sustain a cause of action

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[*] The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

under Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a). We also review whether the district court erred when it denied the Burlington Northern's motion for judgment as a matter of a law. In making that motion, Appellant Burlington Northern argued that the evidence was insufficient to support the jury's verdict in favor of the plaintiff on the retaliation claim. Finally, we decide if the district court abused its discretion when awarding attorney's fees[1] to the plaintiff.

With the plaintiff's cross-appeal, we examine whether the district court erred when it instructed the jury that the plaintiff had to prove malice or reckless disregard by clear and convincing evidence to recover punitive damages under 42 U.S.C. § 1981(a).

We find that Appellee Sheila White failed to establish a retaliation claim under Title VII. Burlington Northern's transfer of White to a different duty within the same job classification and with the same salary, title and seniority was not an adverse employment action sufficient to sustain a Title VII retaliation claim. Similarly, we find that Burlington Northern's temporary suspension of White was not sufficiently adverse to support a Title VII claim. Since the appellant's actions did not result in a cognizable employment action, we reverse the district court and set aside the jury's verdict. Because we set aside the jury's verdict, the issues concerning the jury instructions and attorney's fees are moot.

I. Procedural Background

Plaintiff White brought this action and claimed unlawful discrimination based on sex, 42 U.S.C. § 2000e-2(a)(1), and

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[1] As a matter of style, we use the phrase "attorney's fees" because that usage appears in 17 U.S.C. § 505 and is preferred by the Supreme Court. *See, e.g., Stallworth v. Greater Cleveland Reg'l Transit Auth.*, 105 F.3d 252, 253 n. 1 (6th Cir.1997).

for unlawful retaliation, 42 U.S.C. § 2000e-3. After a jury trial, the jury found in White's favor on her retaliation claim and against her on her sexual harassment and punitive damages claims. The jury awarded White $43,500.00 in damages on the retaliation claim.

On September 18, 2000, Appellant Burlington Northern filed a motion for judgment as a matter of law or, in the alternative, for a new trial. Burlington Northern argued that Plaintiff White failed to establish retaliation because her changed job duties and temporary suspension were not adverse employment actions within the meaning of Title VII. Burlington Northern also argued that Plaintiff White failed to show that the railroad's asserted legitimate, non-discriminatory reason for transferring her was pretextual. Finally, the railroad claimed that the temporal proximity of White's EEOC charge and her suspension did not support an inference of retaliation.

On November 16, 2000, the district court denied Burlington Northern's motion for judgment or, in the alternative, for new trial. The district court found that White presented sufficient evidence that her transfer from forklift operator to working on the track was an adverse employment action. In regards to this finding, it relied upon the "indices that might be unique to a particular situation" language of *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir.1999).

The district court also held that White's temporary suspension was an adverse employment action. It found the temporary suspension was an adverse employment action although Burlington Northern had reversed the decision and made White whole within a month. In making this decision, the district court discounted Burlington Northern's reliance on *Dobbs-Weinstein v. Vanderbilt University*, 185 F.3d 542 (6th Cir.1999). The district court distinguished *Dobbs-Weinstein* because the faculty member there did not suffer

immediate suspension, continued working during the appeals process, and the case dealt with the unique situation of tenure in an academic setting.

With respect to Burlington Northern's claim that White had not proven its legitimate, non-retaliatory reason was pretextual, the district court held that the jurors received conflicting evidence that the jury could properly resolve in White's favor. Similarly, the district court held that White presented sufficient evidence for the jurors to determine that Burlington Northern suspended her because of the EEOC charge.

Finally, the district court denied Burlington Northern's motion for a new trial because it did not show that the verdict was against the clear weight of the evidence.

The district court entered an order granting 80% of White's requested attorney's fees. The district court's initial order neglected to award costs and expenses. After White filed a Rule 59(e) motion to amend judgment, the district court entered an amended final judgment awarding attorney's fees and $4,055.28 in costs and expenses.

II. Factual Background

On June 23, 1997, Burlington Northern hired Sheila White as a maintenance of way track laborer ("track laborer") at the Tennessee Yard in Memphis, Tennessee. Track laborers engage in physically demanding tasks, including maintaining and oiling railway switches, and doing repairs. Before beginning work, Cathy McGee, Burlington Northern's Human Resources Manager, and Marvin Brown, roadmaster of the Tennessee Yard, interviewed White. During her interview, White said that she had extensive prior fork-lift experience.

Following her hire, Brown directed White to operate the stationary forklift at the Tennessee Yard. Before White's hire,

Ralph Ellis carried out these forklift responsibilities at the Tennessee Yard. Besides doing forklift work, Ellis had also worked on a mobile track gang, work that gave him additional per diem pay. After Burlington Northern hired White, Brown gave Ellis the option to continue working on the mobile gang or work on the forklift, but forfeit his per diem rate. Ellis chose to continue working on the mobile gang, thus creating the need to assign an employee to the forklift responsibilities.

White complained that Burlington Northern employees treated her differently because of her sex, female. She alleged that between July 2, 1997, and September 16, 1997, her foreman treated her differently from male employees, and twice made inappropriate remarks. White reported her allegations to Brown, her foreman's supervisor. Brown contacted McGee, and McGee investigated the complaint. As a result of the investigation, Burlington Northern suspended the foreman without pay for ten days on September 26, 1997, and ordered him to attend a sexual harassment training session.

On the same day, roadmaster Brown reassigned the forklift responsibilities to Ellis, the employee who formerly operated the forklift. Burlington Northern says that Brown assigned Ellis to the forklift operator's position because male employees, senior to White, complained that the railroad gave her preferential treatment because she was female. Specifically, the appellant says these men complained that White, who had less seniority, received the forklift job assignment instead of working full-time on the tracks. The railroad said it first learned of these complaints during its sexual harassment investigation of White's foreman. Brown testified on direct examination that he changed White's job assignment based on complaints from senior employees and because Ellis had greater seniority.

On cross examination, Brown identified the complaining employees as Ralph Ellis, Daryl Knight and Gary Augustus. Ellis and Knight were senior to White. Augustus was junior to Ms. White. Of the three, only Ellis had the qualifications to operate a forklift. During cross examination, Brown testified that he knew of the mens' complaint about White's forklift position before White complained to him about sexual discrimination and harassment. However, Brown did not transfer White until after she complained about sexual discrimination and harassment.

Brown's trial testimony is inconsistent with Burlington Northern's interrogatory response. In that response, the railroad said that it transferred White from the forklift position because a senior employee claimed the job according to the collective bargaining agreement. Burlington Northern also stated that it had concerns about potential repercussions from the Union for giving White, a less senior employee, the forklift responsibilities. But, Brown testified that seniority did not govern the forklift job. Instead, he could place anyone in that position. In addition, neither the union, nor anyone else, filed a grievance about White's operation of the forklift.

On October 10, 1997, White filed a discrimination charge with the EEOC alleging sexual discrimination and retaliation. On December 4, 1997, she filed a second charge of discrimination with the EEOC alleging retaliation. In her second EEOC filing, White alleged that Brown had placed her under surveillance and checked on her daily activities. The EEOC mailed the charge of discrimination to Brown on December 8, 1997.

On December 11, 1997, Percy Sharkey, White's foreman, removed White from service for insubordination. On that day, White and her track gang were working in Blytheville, Arkansas supporting a regional tie gang. At trial, Sharkey testified that he directed another employee to ride with him in

his truck because he wanted that employee to help him with some heavy lifting. Sharkey assigned White to ride in another truck with another foreman. She refused, claiming that she had seniority over the employee accompanying Sharkey.

As a foreman, Sharkey could remove White from service for insubordination pending a full investigation. Before removing White from service for insubordination, Sharkey unsuccessfully tried to reach his immediate roadmaster. He then called Brown for advice. At Brown's request, Sharkey wrote a description of the incident and faxed it to Brown. After reviewing Sharkey's written statement, Brown told Sharkey that White's conduct justified her removal from service.[2] At trial, Sharkey testified that Brown told him to pull her out of service for insubordination.[3]

Once Burlington Northern removed her from service, White and her union filed a grievance for her suspension. Under the terms of the union contract, if White did not file a grievance within fifteen days of her removal, the railroad could have fired her. In response to the grievance, Burlington Northern conducted an internal investigation. After inves-

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[2] Brown testified at trial:

> After I reviewed this document, I told Mr. [Sharkey] that according to what he had wrote in this document that she was being insubordinate and if he felt that she was being insubordinate and she continued to refuse to do what he said, to pull her out of service for insubordination, and we would—pending an internal investigation through the organization, and that's it.

(Brown Trial Test., J.A. at 108).

[3] White testified at trial:

> [S]o after we loaded the plates, he decided to go back to the toolhouse and make a phone call, and he called Memphis and he came back out to the truck and told me that I was—suspended, insubordinate, I can hardly say that word, but suspended, and he told me Brown told him to send me home, back to Memphis.

(White Trial Test., J.A. at 210).

tigating the grievance, Burlington Northern concluded that Sharkey overreacted and that White's conduct was not insubordination. On January 16, 1998, the railroad reinstated White to full service with all back pay, including overtime pay and benefits that she was entitled to during the suspension. This made her whole.

III. Argument

A. Motion as a Matter of Law

1. Standard of Review

We review *de novo* the district court's denial of a Rule 50(b) motion for judgment as a matter of law. *Smith v. Leggett Wire Co.*, 220 F.3d 752, 758 (6th Cir.2000). We grant the motion only if, in viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact for the jury, and reasonable minds could only find in favor of the moving party. *Gray v. Toshiba Am. Consumer Prods., Inc.*, 263 F.3d 595, 598 (6th Cir.2001). In making our determination, we review all of the evidence in the record, drawing all reasonable inferences in favor of the non-moving party, making no credibility determinations, and weighing no evidence. *Id.* at 600 (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)).

Besides this standard, *Reeves* directs courts to "disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves*, 530 U.S. at 150, 120 S.Ct. 2097. Further, we give credence to the evidence favoring the non-movant, as well as that evidence supporting the moving party that is uncontradicted and unimpeached, where the evidence comes from disinterested witnesses. *Id.* Finally, the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability. *Id.* at 147, 154, 120 S.Ct. 2097.

2. Elements of Title VII Retaliation Claim

Title VII prohibits retaliation by an employer where an individual has engaged in protected activity. 42 U.S.C § 2000e-3(a). The anti-retaliation provision provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

A plaintiff can establish retaliation under Title VII without proof by direct evidence. In such cases, we have adopted the burden shifting approach initially identified in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See, e.g., Hollins v. Atl. Co.*, 188 F.3d 652, 658 (6th Cir.1998).

Under this standard, White must first establish a prima facie case of retaliation. She must show: 1) she engaged in an activity protected by Title VII; 2) the defendant knew of the exercise of her civil rights; 3) the defendant took an employment action adverse to the plaintiff; and 4) there was a causal connection between the protected activity and the adverse employment action. *Hollins*, 188 F.3d at 661 (citing *Christopher v. Stouder Mem'l Hosp.*, 936 F.2d 870, 877 (6th Cir.1991)).

If White establishes a prima facie case of retaliation, the burden of production shifts to Burlington Northern to articulate a legitimate, non-discriminatory reason for taking the adverse employment action. Burlington Northern's burden is one "of producing an explanation to rebut the prima

facie case—i.e., the burden of 'producing evidence' that the adverse employment actions were taken 'for a legitimate, nondiscriminatory reason.'" *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) (internal citation omitted). Once the employer produces such evidence, the burden shifts to the plaintiff to show that the reasons the employer offered were a pretext for retaliation. *See id.* The plaintiff at all times retains the burden of persuading the trier of fact that the employer intentionally retaliated in violation of Title VII. *See id.* at 507-08, 113 S. Ct. 2742.

3. Adverse Employment Action

On appeal, Burlington Northern says White did not establish that the reassignment of the forklift responsibilities and her temporary suspension were "adverse employment actions."

"[A] plaintiff must identify a materially adverse change in the terms and conditions of his employment to state a claim for retaliation under Title VII." *Hollins*, 188 F.3d at 662 (citing *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir.1996) and *Crady v. Liberty Nat'l Bank & Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir.1993)). A material adverse change includes a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. *See Kocsis*, 97 F.3d at 886 (adopting factors described in *Crady*, 993 F.2d at 136); *see also Hollins*, 188 F.3d at 662. Importantly, a change in employment conditions "'must be more disruptive than a mere inconvenience or an alteration of job responsibilities.'" *Kocsis*, 97 F.3d at 886 (quoting *Crady*, 993 F.2d at 136).

a. Forklift Operation Issue

Burlington Northern says White did not suffer an adverse employment action when Brown took her off forklift duty because this reassignment was a non-actionable lateral job transfer.

We have stated that "[r]eassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims." *Kocsis*, 97 F.3d at 885. Further, we have held that where a job transfer has the same duties, pay, and grade level but requires an additional 20-minute commute, the plaintiff did not satisfy the adverse employment action element. *Darnell v. Campbell County Fiscal Court*, 731 F.Supp. 1309, 1313 (E.D.Ky.1990), *aff'd*, 924 F.2d 1057 (6th Cir.1991). Finally, we have held that a sales representative did not suffer an adverse employment action when her employer reassigned her to territory 80 to 100 miles from her home where she had previously worked the same territory between 30% and 40% of the time. *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 539 (6th Cir.2002).

Other courts have also held that a lateral job transfer is usually not an adverse employment action. *See, e.g., Bradford v. Norfolk S. Corp.*, 54 F.3d 1412, 1420 (8th Cir.1995) (job transfer with poor working conditions was not an adverse employment action); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 457 (7th Cir.1994) (job transfer without loss in salary benefits or responsibilities was not adverse action though the plaintiff had to report to a former subordinate); *Murphy v. Yellow Freight Sys., Inc.*, 832 F.Supp. 1543, 1550-51 (N.D.Ga.1993) (no adverse employment action found where plaintiff did not receive as high of a pay raise as she thought she deserved, she received night and weekend shifts where that was a normal alternating assignment for all employees, employer told her that her clothing violated the company's dress code, and plaintiff complained that her supervisor

documented their conversations in writing and put his notes in her personnel file); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir.1994), *cert. denied*, 513 U.S. 1082, 115 S.Ct. 733, 130 L.Ed.2d 636 (1995) (transferring female employee to another shift was not an adverse employment action); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir.1994) (reassigning plaintiff to more stressful job was not an adverse action).

Finally other courts have noted that a plaintiff's subjective perception that one position is more desirable than another is not controlling. *Kelleher v. Flawn*, 761 F.2d 1079, 1086 (5th Cir.1985).

Here, Burlington Northern argues that White's reassignment to track labor duties did not materially disadvantage White. First, White maintained her position as a track laborer throughout her employment with the railroad. Even when assigned responsibility for operating the forklift, White also worked on track maintenance tasks. Further, White never suffered a termination, a demotion evidenced by a wage or salary decrease, a less distinguished job title, a material loss of benefits, or significantly diminished material responsibilities.

White does not dispute that most lateral transfers are not adverse employment actions. Instead, she says the district court properly found that White suffered an adverse employment action because of the "unique circumstances" language in *Hollins*.[4] 188 F.3d at 662 (quoting the *Crady*

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[4] The district court's opinion on this issue reads as follows:

> Plaintiff presented sufficient evidence to support a finding that moving Plaintiff from operating a forklift to working on the track constituted an adverse employment action. This situation is covered by the "indices that might be unique to a particular situation" language of *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 662 (6th Cir.1999). Plaintiff offered sufficient proof for the jury to find that the unique circumstances surrounding Plaintiff's change in job

factor that a materially adverse change in employment might be indicated by "other indices that might be unique to a particular situation"). Specifically, the district court held that White presented sufficient evidence to show that Brown's reassignment of her to the physically demanding track work from the light forklift duty was an adverse action. White also contends that finding "Brown's action to transfer Ms. White does not qualify as an adverse employment action would have a chilling effect on reporting discrimination."

We disagree. The fact that forklift duty is less physically demanding than track maintenance work does not make White's reassignment a cognizable adverse employment action. The railroad hired White as a track maintenance worker. One of her explicit job responsibilities was to maintain the railroad tracks. We fail to see how White suffered an adverse employment action by being directed to do a job duty for which Burlington Northern hired her. Moreover, contrary to the dissent's assertion, a job transfer that involves heavy lifting and more physically demanding tasks is not a demotion. In fact, in a disability discrimination case, we held that a nurse's reassignment from a nurse supervisor position to a unit nurse position was not a materially adverse change in employment although the new duties involved more physically demanding tasks. We made this holding because the nurse did not lose any pay, benefits, or prestige. *Kocsis*, 97 F.3d at 886-87. We find *Kocsis*

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duties from operating the forklift to working on the track constituted an adverse employment action under the relevant case law. In particular, evidence presented at trial supported a finding that the job responsibilities involved with operating a forklift were light while those responsibilities involved in working on the track were quite heavy and physically demanding. The "unique circumstances" language of *Hollins* applies to these facts, and Defendant has argued no persuasive reason why plaintiff's proof at trial is insufficient to support the jury's finding.

(J.A. at 70-71).

applicable here because cases involving disability and age discrimination are instructive in Title VII cases. *Kocsis*, 97 F.3d at 885.

Therefore, we find that White's reassignment away from forklift responsibilities is not an adverse employment action.

b. Removal From Service

Next, Burlington Northern says that the district court erred when it found that White's suspension constituted an adverse employment action. Burlington Northern argues that White's suspension was not the final employment decision required for an adverse employment action because the railroad reinstated White with full back pay, including overtime pay, and full benefits. Burlington Northern primarily relies on *Dobbs-Weinstein v. Vanderbilt University* as support for this proposition.

In *Dobbs-Weinstein*[5] we held that a suspension was not an adverse employment action. *Dobbs-Weinstein v. Vanderbilt Univ.*, 185 F.3d 542, 545-46 (6th Cir.1999). Moreover, a reinstatement which puts the plaintiff in the position she would have been in absent the suspension, constitutes the "ultimate employment decision" thereby negating a potentially adverse intermediate employment decision. *Id.*

In *Dobbs-Weinstein*, a professor sued Vanderbilt University under Title VII for an allegedly discriminatory denial of tenure. *Id.* at 543-44. The philosophy department initially recommended tenure be given, but the Dean rejected the department's recommendation, and denied plaintiff's tenure.

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[5] In relying on *Dobbs-Weinstein*, we note that it involved a discrimination claim, not a retaliation claim. Both claims, however, share a common element, "adverse employment action." Moreover, in *Hollins*, a retaliation case, we set forth the factors to use in an adverse employment action case after borrowing these factors from an age discrimination case and a disability discrimination case. Therefore, we conclude that *Dobbs-Weinstein* is applicable here.

Id. at 543. Through an internal grievance process, Vanderbilt reversed the Dean's decision. *Id.* at 544. The university promoted plaintiff to associate professor with tenure retroactive to the date the Dean should have granted tenure. *Id.* The university also gave the professor all back pay retroactive to the date the Dean should have promoted her. *Id.* Despite the favorable result she received, the professor sued Vanderbilt for the interim emotional distress she suffered, potential damage to her reputation, and interest on the back pay. *Id.*

The trial court in *Dobbs-Weinstein* granted the defendant summary judgment, and this Court affirmed. *Id.* at 545. Although the review process of the tenure denial lasted eighteen months, this Court held that the professor was not entitled to recover because she did not suffer an ultimate adverse employment decision as the university ultimately gave tenure. *Id.* at 545-46; *see also Jackson v. City of Columbus*, 194 F.3d 737, 752 (6th Cir.1999) (holding that the thirty-day suspension of an African American police chief did not constitute an adverse employment action because the decision did not ultimately constitute "a termination of employment, a change in salary, demotion, loss of benefits, decreased work hours, or significantly diminished material responsibilities."). We reasoned that employees should not challenge intermediate employment decisions when the ultimate employment decision is not adverse to the plaintiff. *Dobbs-Weinstein*, 185 F.3d at 546. We further elaborated:

> Dobbs-Weinstein has not created a claim for employment discrimination by suing Vanderbilt before the final decision on her promotion and tenure was made. She argues that her claims for emotional distress and professional reputation damages mean that her claim is viable, but that argument places the cart before the horse. A claim for potentially recoverable damages does not transform Venable's decision into an "adverse

> employment action." *Dobbs-Weinstein succeeded in the grievance process, and Vanderbilt's final decision was to grant her tenure. She has not here suffered a final or lasting adverse employment action sufficient to create a prima facie case of employment discrimination under Title VII.* To rule otherwise would be to encourage litigation before the employer has an opportunity to correct through internal grievance procedures any wrong it may have committed.

Id. (emphasis added).

Other courts have also held that an adverse employment action must be based on an "ultimate employment decision" by an employer. *See, e.g., Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.1997), *cert. denied*, 522 U.S. 932, 118 S.Ct. 336, 139 L.Ed.2d 260 (1997); *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.) (*en banc*), *cert. denied*, 454 U.S. 892, 102 S.Ct. 388, 70 L.Ed.2d 206 (1981) (holding that Title VII prohibits only "ultimate employment decisions" which are retaliatory and not "interlocutory or mediate decisions."); *see also Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 755 (4th Cir.), *cert. denied*, 519 U.S. 818, 117 S.Ct. 70, 136 L.Ed.2d 30 (1996).

The district court sought to distinguish *Dobbs-Weinstein*. The district court noted that the *Dobbs-Weinstein* professor never stopped working and never suffered a break in payment.[6] Here, White lost all pay and benefits immediately

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[6] The district court explained that "[w]hereas the plaintiff in *Dobbs-Weinstein* was initially informed that her tenure had been denied and that her contract would not be renewed at the end of the year, Plaintiff in the present case was immediately suspended without pay. There is a marked difference between being told that employment will cease in a couple of months and being immediately suspended indefinitely without pay or other benefits." (J.A. at 72).

upon her suspension. The district court also found crucial the fact that White faced permanent termination in contrast to the professor.

We reject these arguments. First, although the professor continued to work during the appeals process, she did lose the increased pay and benefits associated with tenure. In fact, when the university granted the professor's tenure, it also gave her retroactive back pay to the date that it should have granted tenure. This period was 18 months long. By contrast, White waited only thirty-seven days before the railroad reinstated her and gave her back pay. We also reject White's arguments that the fact that her suspension occurred during the Christmas holiday season makes her suspension unique. White misplaces this argument. While emotional injuries may be affected by the season, it does not make the suspension a sufficiently adverse employment action.

We also note that contrary to the district court's assertion, the *Dobbs-Weinstein* plaintiff also faced termination if she did not affirmatively appeal the tenure denial. At the time the university notified the professor of the tenure denial, it also informed the professor of her termination, effective at the end of the academic year. The fact that the *Dobbs-Weinstein* plaintiff bore the onus of initiating the review process did not alter our conclusion there that the professor had not suffered an adverse employment action. We fail to see why the result should be any different here. Further, the employment action complained of must be "the ultimate employment decision." Here, the review process resulted in White's reinstatement. Therefore, her suspension was not "the ultimate employment decision."

More important, the *Dobbs-Weinstein* professor did lose pay for approximately three months from August, 31, 1995 to November 1995. *Dobbs-Weinstein*, 185 F.3d at 544 (noting that in November 1995 after the university reversed the tenure denial, the professor "was given full pay for the period

after August 31, 1995, when payment for her previous contract had ended."). Following the tenure denial, the professor's appointment expired in August 1995, the end of the academic year. The university reversed the denial of the tenure in November 1995. Therefore, the *Dobbs-Weinstein* plaintiff received no pay from the university for three months. Yet, we found that the reinstatement with back pay and benefits stopped the original tenure decision from being an adverse employment action.

Additionally, the district court's reasoning ignores the inescapable fact that Burlington Northern ultimately reversed White's suspension and reinstated her with full back pay and overtime. Burlington Northern's suspension of White was the first step in the employment decision making process. But, it was only an interim decision. The railroad had a grievance process available to challenge such decisions. The internal investigation was the next step in the chain. The railroad timely completed this investigation and reinstated White with full back pay and benefits thirty-seven days after her suspension. Therefore, White's appeal of her suspension prevented Burlington Northern's interim decision from becoming final. The dissent in *Dobbs-Weinstein* supports this position:

> Unlike the majority, I am not concerned that permitting Dobbs-Weinstein to go forward with her action will encourage premature litigation concerning adverse initial employment decisions. *As long as an employer's appeal or grievance process operates in a timely fashion, the employee generally will not suffer a materially adverse action. This is particularly true if the employer refrains from terminating the employee in the interim, but, even if the employee is wrongfully terminated, voluntary*

> *reinstatement and provision of back pay will limit or possibly even obviate the recovery of compensatory damages.*

Id. at 548 (Moore, J., dissenting) (emphasis added).

The cases White cites in support of her contention that temporary suspensions are adverse employment actions are distinguishable. The employer upheld all of the suspensions in those cases. *See Gribcheck v. Runyon*, 245 F.3d 547, 549 (6th Cir.2001) (upholding fourteen day suspension); *McKethan-Jones v. Ohio Dept. of Health*, 7 Fed.Appx. 475 (6th Cir.2001); *Dowell v. Rubin*, 234 F.3d 1268 (6th Cir. Oct.31, 2000) (upholding five day suspension without pay). Therefore, the employee did not recover lost wages and benefits.

White's final argument is that *Dobbs-Weinstein* is limited to academic tenure cases. We disagree. In fact, we cited to *Dobbs-Weinstein* in a racial discrimination claim outside the tenure setting, for the proposition that a police chief did not suffer an adverse employment action where he suffered no "final or lasting harm." *See Jackson*, 194 F.3d at 752.

Additionally, the dissent says that *Dobbs-Weinstein* is inapplicable outside the tenure setting because we relied exclusively on tenure decisions in making our determination in *Dobbs-Weinstein*. Again, we disagree. In fact, we cited a non-tenure case as support for our conclusion that a Title VII plaintiff must suffer an 'ultimate employment decision.' *Dobbs-Weinstein*, 185 F.3d at 545 (stating "we are not alone in focusing on whether Dobbs-Weinstein can present a case based on an 'ultimate employment decision'" and citing *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.1981) (postal discrimination case)).

Finally, we also disagree with the dissent's assertion that a suspension for a university professor does not have as severe an impact as a suspension for a blue collar employee. The

dissent ignores the adverse impact that a suspension or denial of tenure has on a professor's academic reputation. This reputational consequence, which exists to a lesser degree in the blue collar setting, can be more damaging in the long-term to a university professor than a temporary suspension for a blue collar worker. Accordingly, we find that White failed to show an adverse employment action sufficient to make out a Title VII retaliation claim.

4. Legal Sufficiency of the Evidence

Next, Burlington Northern says that the jury had insufficient evidence to find in favor of White on her retaliation claim. Since we find that White did not meet her prima facie case of retaliation, this issue is moot.

B. Attorney's Fees

Again, because we hold that White did not present sufficient evidence that she suffered an adverse employment action, the attorney's fee issue is moot.

C. Jury Instructions on Punitive Damages

On cross-appeal, White says that the district court erred when it instructed the jury that "[p]unitive damages may be considered if and only if, the plaintiff has shown by clear and convincing evidence that a defendant has acted either intentionally, recklessly, maliciously, or fraudulently." Because White did not show the required prima facie elements of retaliation, this issue is moot.

IV. Conclusion

We find that the appellant's transfer of Sheila White to a different duty within her same job classification was not an adverse employment action sufficient to support a Title VII claim. Similarly, we find that the appellant's temporary suspension of White, a suspension that it soon overturned with back pay, was also not an adverse employment action

sufficient to support a Title VII claim. Since White does not show an adverse employment action, she fails to make out a prima facie case. We therefore reverse the district court and set aside the jury's verdict. Because we set aside the jury's verdict, the issues concerning the jury instructions and attorney's fees are moot. The judgment of the U.S. District Court for the Western District of Tennessee in case 00-6780 and 01-5024 is REVERSED in part, and REMANDED to set aside the jury verdict.

CLAY, *Circuit Judge*, dissenting.

The majority has determined that in light of *Dobbs-Weinstein v. Vanderbilt University*, 185 F.3d 542 (6th Cir.1999), Defendant did not take materially adverse employment action by removing Plaintiff from her position, assigning her more arduous work, and suspending her without pay for thirty-seven days before the suspension was later reversed with back pay. Because the majority's opinion is not supported by our precedent or the record below, I respectfully dissent.

Plaintiff began working for Defendant on June 23, 1997 as a track laborer, but Roadmaster Brown testified that he decided to offer her a position operating a forklift. As a forklift operator, Plaintiff performed other duties, but this was because her primary duty of operating the forklift did not take all day. Plaintiff subsequently submitted an internal complaint about the sexual harassment of her by Foreman Bill Joiner. On the very day that Plaintiff was notified of Joiner's suspension for the sexual harassment, Brown transferred Plaintiff from her forklift operator job to other track laborer duties full-time, despite a lack of complaints about her performance on the forklift. The transfer was allegedly due to complaints from other workers that Plaintiff was not sufficiently senior for the forklift position. Yet Brown replaced Plaintiff with Ralph Ellis, the man who earlier had voluntarily given up the forklift, and who did not complain about Plaintiff being given the job. No other qualified workers senior to Plaintiff were available to run the forklift.

After Plaintiff was removed from the forklift position, she filed two EEOC complaints, alleging, among other things, that the removal was in retaliation for the sexual harassment complaint she had filed. Only three days after a copy of the second complaint was sent to Roadmaster Brown, Foreman Sharkey suspended Plaintiff for insubordination, and even after Brown determined that Sharkey had overreacted and

even though Brown could have reversed Sharkey's decision, he declined to do so. Instead, Plaintiff filed a grievance with the union, a full internal investigation ensued, and a hearing officer determined what Roadmaster Brown knew all along-that Sharkey had overreacted and that Plaintiff did not commit insubordination. Meanwhile, Plaintiff's co-worker, Greg Nelson, who arguably was the most disobedient in the entire incident, was not suspended or disciplined in any manner for failing to follow Sharkey's orders.

1. Adverse Employment Action

Like the majority, I recognize that this Court requires a materially adverse employment action for a plaintiff to state a *prima facie* case of Title VII retaliation. Unlike the majority, however, I believe that Plaintiff satisfied her requirement in that regard. In view of the facts and circumstances, Plaintiff's effective demotion and subsequent suspension, even with reinstatement with back pay, together constituted the requisite materially adverse employment action.

a. Removal from the Forklift Position

With regard to Roadmaster Brown's removal of Plaintiff from the forklift job, I disagree with the majority's acceptance of Defendant's slant on the facts. Although it is true that Plaintiff was initially hired as a track laborer, and she sometimes performed other duties because operating the forklift, in the words of Defendant, "was not a fulltime job" (Defendant's Br. at 5), Defendant has mischaracterized the forklift job as a happenstance duty to be farmed out to employees in a random fashion. In fact, the forklift job was not merely an occasional task; it was an actual job which, according to Roadmaster Brown's own testimony, was advertised to the railroad employees. When Roadmaster Brown took Plaintiff off the forklift, he did not merely reshuffle her responsibilities; he took away her job. Plaintiff, in effect, experienced not a mere "lateral transfer," as the

majority states, but a demotion, because, for the same pay, her work became much more strenuous. As Plaintiff testified, track labor required more physical exertion and was "much dirtier" than the forklift job. (J.A. at 201.) Some of the dirty aspects of the job include "picking up tools, oiling them from down on the ground where sometimes it require[d] you to get on your knees and hands." (J.A. at 202.) Adverse aspects also included prolonged sun exposure.

The majority asserts that under *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 886-87 (6th Cir.1996), job reassignments that include some increased physical labor are not sufficient to constitute an adverse employment action. *Kocsis*, however, is distinguishable from the matter at hand inasmuch as unlike in *Kocsis*, where the duties of the plaintiff nurse increased only with respect to the "frequency [of] lifting and maneuvering residents," *id.* at 879-80, Plaintiff's reassignment to the track laborer position involved an increase in the frequency of objects lifted as well as an increase in the weight of the objects lifted. Furthermore, Plaintiff's work as a track laborer required that she be exposed to the sun more often than before, and involved much dirtier work than her previous position as a forklift operator. Therefore, the increased physical demands brought about by the reassignment of Plaintiff to the track laborer position went well beyond that of the increased physical demands experienced by the plaintiff in *Kocsis*, and went well beyond a "mere inconvenience" as described in *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir.1999). Similarly, Plaintiff's reassignment to the track laborer position did not constitute an ordinary lateral job transfer, thus taking this case out of the reach of those cases finding that a lateral transfer does not constitute an adverse employment action. *See Policastro v. Northwest Airlines*, 297 F.3d 535, 540 (6th Cir.2002); *Darnell v. Campbell County Fiscal Court*, 731 F.Supp. 1309, 1313-14 (E.D.Ky.1990); *see also Bradford v. Norfolk S. Corp.*, 54 F.3d 1412, 1420 (8th Cir.1995); *Flaherty*

v. Gas Res. Inst., 31 F.3d 451, 457 (7th Cir.1994); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir.1994); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir.1994). Simply stated, Plaintiff's reassignment from a forklift operator to a track laborer involved material alterations of Plaintiff's job responsibilities thus constituting an adverse employment action for purposes of establishing a *prima facie* case of retaliation under Title VII. *See Hollins*, 188 F.3d at 662.

b. Thirty-seven Day Suspension

Plaintiff's thirty-seven day suspension constituted an adverse employment action as well. First of all, there is authority in this Circuit that a temporary suspension can amount to an adverse employment action. In *Gribcheck v. Runyon*, 245 F.3d 547, 551 (6th Cir.2001), this Court held that the plaintiff suffered an adverse employment action when he was suspended without pay for fourteen days and did not receive back pay. On the other hand, as the majority notes, a temporary suspension with pay is not an adverse employment action. *See Jackson v. City of Columbus*, 194 F.3d 737, 752 (6th Cir.1999). The unresolved question for purposes of this case is whether a suspension without pay, coupled with a subsequent reinstatement and back pay, should be classified as an adverse employment action.

The majority claims this question was answered by the reasoning of *Dobbs-Weinstein*, because the plaintiff in that case received all back pay during the time she was not working for the university, and therefore was "made whole." However, it is apparent that key to this Court's decision in finding no adverse employment action was that the situation involved a denial of tenure. *Dobbs-Weinstein*, 185 F.3d at 545-46. Indeed, the Court relied primarily on tenure

decisions in making its determination.[1] *Id.* at 546 (citing several district courts that had reached similar conclusions in discrimination cases based on delayed grant of tenure). The Court also noted that "tenure decisions in an academic setting involve a combination of factors which tend to set them apart from employment decisions generally." *Id.* at 545 (citing *Zahorik v. Cornell Univ.*, 729 F.2d 85, 92-93 (2d Cir.1984)). Such considerations included the following:

> the lifetime nature of the contract, the fact that the decisions are often non-competitive, the decentralized nature of the decision-making process, the multiplicity of facts in the decision, the fact that tenure decisions are often quite contentious, and the reluctancy of courts to review the merits of a tenure decision.

Id. (citing *Zahorik*, 729 F.2d at 92-93). The Court further explained, "Because tenure decisions are so complex and potentially contentious, universities are well-served to have a grievance procedure for individuals wishing to appeal any of the many intermediate decisions or evaluations made during the tenure review process." *Id.*[2]

The majority's opinion implies that *Dobbs-Weinstein* stands for the proposition that subsequent reinstatement with back pay vitiates any earlier wrong a plaintiff may have suffered. If this is what *Dobbs-Weinstein* intended to hold, it could have done so simply enough. Instead, it explained that tenure decisions present a complex set of challenges that

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[1] Contrary to the majority's assertion, the dissent does not claim that *Dobbs-Weinstein* relied *exclusively* on tenure decisions, but that it relied *primarily* on them.

[2] Other circuits also have acknowledged the unique nature of tenure decisions. *See Tanik v. S. Methodist Univ.*, 116 F.3d 775, 776 (5th Cir.1997); *Brousard-Norcross v. Augustana Coll. Ass'n*, 935 F.2d 974, 976 (8th Cir.1991); *Kumar v. Bd. of Trs., Univ. of Mass.*, 774 F.2d 1, 11 (1st Cir.1985); *Zahorik*, 729 F.2d at 92-93 (2d Cir.1984).

justify a mechanism designed to reverse earlier erroneous tenure decisions. Therefore, the initial decision of the dean not to concur in recommending the plaintiff for tenure was not a final decision upon which the plaintiff could base an adverse employment action, even though her contract terminated and she was out of work during part of the review process. Despite the lack of authority from this Court equating a denial of tenure with a suspension, the majority ignores the *Dobbs-Weinstein* court's underlying reasoning and mistakenly equates the situations based on similar outcomes: reinstatement with back pay.

The majority's use of the dissent in *Dobbs-Weinstein* is misplaced. *See* 185 F.3d at 548. The dissent was speaking mainly in the context of tenure decisions, which as explained earlier, constitute a unique area in Title VII cases because of the nature of those decisions. Therefore, a "timely fashion" in the tenure context differs from that in the more conventional employment context. In other words, an immediate thirty-seven-day suspension for a blue collar worker, who may be living from paycheck to paycheck, can actually have a more severe impact on the worker than a sixty-day lapse for a university professor who had been warned well ahead of time that she would not receive tenure and that her employment contract would expire. The majority, however, again mistakenly equates the tenure denial scenario with that of employment suspensions in non-academic contexts.[3]

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[3] The majority has mischaracterized the dissent as saying that a blue-collar worker's suspension results in a more severe impact than a denial of tenure for a university professor. To be clear, the dissent makes no such categorical statement. The majority had suggested that the *Dobbs-Weinstein* dissent supported its contention that Plaintiff's thirty-seven-day wait for reinstatement and back pay paled in comparison to the delay experienced by the *Dobbs-Weinstein* plaintiff, who had to wait over sixty days and was still denied Title VII relief. To the contrary, the point of the dissent is that a delay in the tenure denial context, or the uncertainty experienced by a professor as a result of the non-renewal of an

Even if one finds the situations appropriate for comparison, there are material differences between *Dobbs-Weinstein* and the present case. The plaintiff in *Dobbs-Weinstein* was on notice that her job contract would not be renewed. Although there was an interim period where she was not working and received no pay, this was because the relevant contractual period had lapsed, and she was aware of this possibility several months ahead of time. In the present case, Roadmaster Brown, a senior level employee at the railroad, decided to sustain Foreman Sharkey's suspension, despite his belief that the suspension was not warranted. The suspension was immediate, and Plaintiff's pay and benefits were immediately terminated without warning, pending an investigation. Suddenly, Plaintiff had no income with which to pay her bills, and was left in limbo to await a determination as to her future at the railroad. The adverse nature of the suspension was not reversed simply because she subsequently received retroactive pay. While the fact that Plaintiff was reinstated might have mitigated her damages, it was not dispositive of whether an adverse employment action occurred. *Dobbs-Weinstein* is properly distinguishable, because that case involved not a suspension in an ordinary employment context, but a denial of tenure in an academic setting, which was integral in the Court's holding.

At any rate, even if these employer actions individually were not sufficiently adverse, the conduct in the aggregate created a situation that constituted a materially adverse employment action. Although the majority considered the two actions individually, several employer actions, taken together, may also constitute an adverse employment action. *See Ford v. Gen. Motors Corp.*, 305 F.3d 545, 554 (6th Cir.2002) (holding that plaintiff's increased workload,

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employment contract, should not be equated with the situation of an employee who receives an immediate suspension in a non-academic setting.

heightened scrutiny, and constructive discharge, taken together, constituted materially adverse employment action); *Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 50 (1st Cir.1999) (holding that several employment actions, "viewed in the aggregate, could be considered 'materially adverse'"). Certainly this Court does not recognize *de minimus* actions to be materially adverse. *See Bowman v. Shawnee State Univ.*, 220 F.3d 456, 462 (6th Cir.2000). However, the suspension and job change, taken together, were more than *de minimus*; they were materially adverse within the meaning of Title VII.

2. Other Elements in a Title VII Claim

Although not addressed by the majority, the remaining relevant element necessary for a plaintiff to establish a *prima facie* case of retaliation is a causal connection between the Title VII-protected activity taken by the employee and the adverse employment action taken by the employer. *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792 (6th Cir.2000). This Court has held that such a causal connection may be shown through circumstantial evidence, such as a proximity of time between the two events. *See, e.g., Fenton v. HiSAN*, 174 F.3d 827, 832 (6th Cir.1999) (citing *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir.1987)). Most notably, Plaintiff was removed from the forklift job almost immediately after her complaints about Foreman Joiner's sexual harassment and discrimination resulted in his suspension. Then, when Plaintiff filed an EEOC complaint about this retaliatory move, Roadmaster Brown allowed Foreman Sharkey to suspend her, knowing the suspension was unwarranted, only three days after a copy of the EEOC complaint was sent to Brown. Moreover, testimony at trial indicated that Sharkey told Plaintiff that Brown considered her a troublemaker, and Sharkey even admitted that he was not "crazy" about women working at the railroad. Therefore,

more than sufficient evidence existed to support a causal connection between Plaintiff's complaints and Defendant's subsequent adverse actions.

After the employee establishes a *prima facie* case of retaliation, the burden shifts to the employer to assert a non-discriminatory reason for the adverse action. *Ford*, 305 F.3d at 553. Once the employer has done so, the burden shifts back to the employee to demonstrate that the asserted reason is a pretext for retaliation. Defendant contends that there was a complete absence of proof as to whether its reasons for the employment decisions were pretextual because Plaintiff failed to rebut the fact that Defendant moved a more senior person to the forklift duties, and that it had received complaints from other senior employees regarding Plaintiff being allowed to operate the forklift as a junior employee.

Defendant's argument is without merit. Numerous inconsistencies surfaced among Defendant's witnesses at trial from which the jury could infer that the reasons proffered by Defendant were pretextual. First of all, Roadmaster Brown testified on direct examination that there had been "a lot of complaints" from senior employees in the maintenance of way department pertaining to Plaintiff, a junior employee, being allowed to work on the forklift, a comparatively light and easy job. (J.A. at 105.) However, on cross-examination, Brown's story changed. He claimed that "one, possibly two senior employees" complained about Plaintiff working on the forklift. (J.A. at 115.) He named these employees as Ellis, Gary Augustus and Daryl Knight. However, Augustus was actually junior to Plaintiff, not senior; Knight, although technically senior to Plaintiff, was hired on the same day as Plaintiff; and Ellis testified that he never made any complaints about Plaintiff operating the forklift and that Brown *requested* that Ellis return to that duty.

Roadmaster Brown's testimony was also inconsistent with Defendant's interrogatory answer as to why Plaintiff had been removed from her forklift operator duties. According to the interrogatory, a track laborer with more experience than Plaintiff had claimed the job pursuant to a collective bargaining agreement (CBA). Brown admitted at trial, however, that the "job" was not governed by the seniority provisions of the CBA and that Brown could have assigned anyone he wanted, including Plaintiff, to the "forklift job." (J.A. at 123-24.) Brown had also earlier stated that Richard Spears, general chairman of the union, called to complain about Plaintiff performing forklift duties. However, Spears testified at trial that he could not recall making any such complaint to Brown and had no record of such a complaint. Foreman Joiner's testimony was also inconsistent. Although he testified at his deposition that he had not heard complaints from co-workers about Plaintiff driving the forklift, he changed his story at trial, testifying to some complaints.

Given these inconsistencies, the jury was entitled to believe that Defendant's proffered explanations were pretextual and that the real reason for Defendant's action was unlawful retaliation. This is particularly so when ruling on a Rule 50 motion because a court "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 867 (6th Cir.2001) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)). Under the applicable standard of review, Plaintiff adduced sufficient evidence to survive Defendant's motion, and the district court correctly rejected Defendant's arguments.

Conclusion

This Court requires that a materially adverse action "be more disruptive than a mere inconvenience or an alteration of job responsibilities." *Hollins*, 188 F.3d at 662. Plaintiff's

thirty-seven-day suspension and her removal from the forklift position was more than a "mere inconvenience" or otherwise *de minimus* action. In addition, there were sufficient inconsistencies with respect to the reasons provided by Defendant to explain the actions taken against Plaintiff for the jury to infer that the reasons were pretextual. I would therefore affirm the district court's denial of Defendant's motion for judgment as a matter of law.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Filed Nov. 16, 2000]

No. 99-2733 Ml/Bre

SHEILA WHITE,

Plaintiff,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

ORDER DENYING DEFENDANT'S MOTION
FOR JUDGMENT AS A MATTER OF LAW OR,
IN THE ALTERNATIVE, FOR NEW TRIAL

Before the Court is Defendant's Motion For Judgment As A Matter Of Law Or, In The Alternative, For New Trial filed on September 18, 2000. The parties presented this Title VII case to a jury, and the jury returned a verdict for the Plaintiff on the claim of retaliation. Defendant now seeks either entry of a judgment for Defendant or a new trial pursuant to Federal Rules of Civil Procedure 50 and 59, respectively. For the reasons stated below, Defendant's motion is DENIED.

I. Motion for Judgment as a Matter of Law under Rule 50

Federal Rule of Civil Procedure 50 ("Rule 50") states that

> (b) If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted

> the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59.

The current motion is properly presented to the Court since Defendant moved for judgment as a matter of law after the close of all proof and the Court denied that motion.

The Sixth Circuit has stated that a motion under Rule 50 "should be granted . . . only if reasonable minds could not come to a conclusion other than one favoring the movant." *Williams v. Nashville Network*, 132 F.3d 1123, 1131 (6th Cir. 1997). The inquiry is whether sufficient evidence supported the jury's findings. Fed. R. Civ. P. 50(b); *Williams*, 132 F.3d at 1131. A court must "'indulge all presumptions in favor of the validity of the jury's verdict,' and 'should refrain from interfering with a jury's verdict unless it is clear that the jury reached a seriously erroneous result.'" *Williams*, 132 F.3d at 1131, quoting *Brooks v. Toyotomi Co.*, 86 F.3d 582, 588 (6th Cir. 1996). In considering a Rule 50 motion, a Court may not upset the credibility determinations of the jury or weigh the evidence for itself. *Williams*, 132 F.3d at 1131.

Defendant argues that the jury's verdict in favor of Plaintiff on the claim of retaliation was unsupported by evidence presented at trial. Specifically, Defendant presents three bases for this argument: (1) Plaintiff did not present sufficient evidence to show that either the change in job duties from operating a forklift to working on the track or Plaintiff's suspension in December, 1997, constituted an adverse employment action; (2) Plaintiff failed to show that Defendant's assertion of legitimate, non-retaliatory reasons for Plaintiff's transfer from operating a forklift to working on the track and for her suspension were pretextual; and (3) the temporal difference between Plaintiff's filing of her Equal Employment

Opportunity Commission ("EEOC") charge and her suspension in December, 1997 so great as to not allow an inference of retaliation. However, trial testimony does not support Defendant's argument.[1]

A. Adverse employment action

1. Change from operating a forklift to working on the track

Plaintiff presented sufficient evidence to support a finding that moving Plaintiff from operating a forklift to working on the track constituted an adverse employment action. This situation is covered by the "indices that might be unique to a particular situation" language of *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 662 (6th Cir. 1999). Plaintiff offered sufficient proof for the jury to find that the unique circumstances surrounding Plaintiff's change in job duties from operating the forklift to working on the track constituted an adverse employment action under the relevant case law. In particular, evidence presented at trial supported a finding that the job responsibilities involved with operating a forklift were light while those responsibilities involved in working on the track were quite heavy and physically demanding. The "unique circumstances" language of *Hollins* applies to these facts, and Defendant has argued no persuasive reason why plaintiff's proof at trial is insufficient to support the jury's finding.

2. December 1997 suspension

Sufficient evidence also supports the jury's finding that Plaintiff's suspension in December 1997, constituted an

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[1] As an initial matter, Defendant argues in its brief that Plaintiff failed to meet its burden by "direct evidence." [Def.'s Mem. in Supp. of Mot. for J. as a Matter of Law at pp. 1, 8.] As Plaintiff correctly points out, direct evidence is not required, and Plaintiff may meet its burden through indirect or circumstantial evidence. *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 572 (6th Cir. 2000) (holding that proof of violation of Title VII by direct evidence or indirect evidence are mutually exclusive paths; it is sufficient for a plaintiff to prove violation through indirect evidence only).

adverse employment action. Specifically, evidence at trial showed that the suspension was without pay and that termination would have resulted but for the intervention of the union. In its memorandum in support of its motion, Defendant relies heavily upon the Sixth Circuit's decision in *Dobbs-Weinstein v. Vanderbilt University*. 185 F.3d 542 (6th Cir. 1999). In *Dobbs-Weinstein*, the Sixth Circuit held that the plaintiff, who had been denied tenure but then granted tenure after utilizing the university's internal appellate process, had not experienced a "materially adverse employment action." *Id.* at 546. The facts of *Dobbs-Weinstein* are sufficiently different from the present case to distinguish the two. Whereas the plaintiff in *Dobbs-Weinstein* was initially informed that her tenure had been denied and that her contract would not be renewed at the end of the year, Plaintiff in the present case was immediately suspended without pay. There is a marked difference between being told that employment will cease in a couple of months and being immediately suspended indefinitely without pay or other benefits. Furthermore, Plaintiff testified that the suspension without pay occurred near the winter holiday season, a fact which increased the adverse nature of the action. While this fact alone is not dispositive, considering it in conjunction with the other proof supports the legally cognizable characteristic of the suspension as adverse.

Defendant also contends that the suspension was not an ultimate decision as required by the Sixth Circuit in *Dobbs-Weinstein*, but rather an intermediate decision for which Title VII liability does not apply. The present case is distinguishable from the facts in *Dobbs-Weinstein*. In *Dobbs-Weinstein*, the plaintiff continued to work for the defendant while the appeals process was taking place. In the current case, however, Plaintiff's employment was immediately suspended. It was then Plaintiff's burden to appeal the suspension and prove that it was incorrect. While Defendant's actions in reinstating Plaintiff to her prior position and granting her backpay was designed to remedy the discriminatory actions of Defen-

dant's employee, this fact goes to the question of damages and not liability under Title VII.

In addition to this specific procedural difference, the *Dobbs-Weinstein* case dealt with the unique situation of tenure in an academic setting. While tenure decisions are certainly subject to judicial scrutiny under Title VII, they "involve considerations that set them apart form other kinds of employment decisions."[2] *Tanik v. So. Methodist Univ.*, 116 F.3d 775, 776 (5th Cir. 1997); *see also Zahorik v. Cornell Univ.*, 729 F.2d 85, 92 (2d Cir. 1984); *Kumar v. Univ. of Mass.*, 774 F.2d 1, 11 (1st Cir. 1985). Plaintiff's experience in the present case was sufficiently distinct from that of the plaintiff in *Dobbs-Weinstein*. Defendant has not adequately persuaded this Court that the holding of *Dobbs-Weinstein* should be extended to cover non-tenure situations. Plaintiff's suspension constituted a legally adverse employment action under Title VII.

B. Pretext

Defendant also argues that Plaintiff failed to present legally sufficient evidence to support the jury's conclusion that Defendant's proffered legitimate, non-retaliatory reason for Plaintiff's change from operating the forklift to working on the track was pretextual. Testimony presented at trial contradicted Marvin Brown's testimony that he placed Ralph Ellis in the forklift operator's role in response to complaints that the forklift should be operated by an employee with more seniority than Plaintiff. The jury simply chose to disbelieve Mr. Brown. Even if the Court would have assessed the witness' credibility differently, the Court cannot substitute its credibility determinations for the jury's determinations.

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[2] Although the Court in *Tanik* was not considering a claim for retaliation, the unique characteristics of tenure decisions logically apply to retaliation as well as other Title VII claims.

C. Temporal distance between EEOC charge and suspension

Defendant's argument on this point is that Percy Sharkey could not have retaliated because of the length of time between Plaintiff's filing of her EEOC charge in October and her suspension in December. While temporal proximity between knowledge of a complaint and alleged retaliatory behavior may indicate whether the action was taken in retaliation for filing a charge alleging discrimination, temporal proximity is a factor to be considered by the fact finder. *See Nguyen v. City of Cleveland*, 229 F.3d 559, 2000 WL 1505090 (6th Cir., Oct. 11, 2000) (specific page references not available). In the present case, Plaintiff presented sufficient evidence, including linking Marvin Brown to the decision to suspend her, to support the jury's determination that Defendant suspended her because of her EEOC charge.

For all these reasons, the Court DENIES Defendant's motion for judgment as a matter of law.

II. Motion for a New Trial under Rule 59

Federal Rule of Civil Procedure 59 ("Rule 59") states in relevant part that

> (a) A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

The standard for granting a new trial is more lenient than the standard for a motion under Rule 50. 9A Wright & Miller, Federal Practice and Procedure § 2531 pp. 302-206 (2d ed. 1995). The Second Circuit has addressed this difference in stating that:

> [u]nlike judgment as a matter of law, a new trial may be granted even if there is substantial evidence supporting the jury's verdict. Moreover, a trial judge is free to

> weigh the evidence himself, and need not view it in the light most favorable to the verdict winner.

DLC Mgmt Corp. v. Town of Hyde Park, 163 F.3d 124, 134 (2d Cir. 1998).

Defendant argues that a new trial is appropriate in this case because the jury's verdict was against the clear weight of the evidence. As the Sixth Circuit has stated, "[i]n determining whether to grant a new trial when the claim is that the verdict is against the weight of the evidence, a district court must compare and weigh the opposing evidence and it must set aside the verdict if it determines that the verdict is against the clear weight of the evidence." *Clay v. Ford Motor Co.*, 215 F.3d 663, 672 (6th Cir. 2000); *see also Holmes v. City of Massillon*, 78 F.3d 1041, 1047 (6th Cir. 1996).

The Court finds no reason to disturb the jury's verdict by ordering a new trial. Defendant has not shown to the Court why any of the jury's credibility determinations were against the clear weight of the evidence and resulted in a miscarriage of justice. In fact, Plaintiff offered credible witness testimony concerning the elements of her retaliation claim. While Defendant offered evidence to counter Plaintiff's proof. No miscarriage of justice resulted. Therefore, the Court DENIES Defendant's motion for a new trial under Rule 59.

III. Conclusion

For the above reasons, Defendant's motion is DENIED in its entirety. The verdict rendered by the jury stands.

Entered this 15 day of November, 2000.

/s/ Jon P. McCalla
JON P. MCCALLA
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 00-6780, 01-5024

SHEILA WHITE,
Plaintiff-Appellee/Cross-Appellant,

v.

BURLINGTON NORTHERN & SANTE FE RAILWAY COMPANY,
Defendant-Appellant/Cross-Appellee.

Feb. 11, 2003

Before: MARTIN, *Chief Judge*; BOGGS, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, and ROGERS, *Circuit Judges*.

ORDER

A majority of the Judges of this Court in regular active service have voted for rehearing of these cases en banc. Sixth Circuit Rule 35(a) provides as follows:

> "The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal."

Accordingly, it is ORDERED, that the previous decision and judgment of this court is vacated, the mandate is stayed and the cases are restored to the docket as pending appeals.

It is further ORDERED that the appellant cross-appellee file a supplemental brief not later than Thursday, March 13, 2003 and the appellee cross-appellant file a supplemental brief not later than Monday, April 14, 2003.

The Clerk will schedule these cases for oral argument as directed by the Court.

APPENDIX E

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed April 26, 2005]

Nos. 00-6780; 01-5024

SHEILA WHITE,
Plaintiff-Appellee/Cross-Appellant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY CO.,
Defendant-Appellant/Cross-Appellee.

Before: BOGGS, *Chief Judge*; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, and COOK, *Circuit Judges.*

ORDER

Before the court are defendant-appellant/cross-appellee's petition for rehearing from en banc determination or alternatively, to clarify court opinion, defendant-appellant/cross-appellee's motion to stay the mandate and plaintiff-appellee/cross-appellant's motion to issue the mandate in this case.

The petition for rehearing and the motion to clarify opinion are denied. With respect to the motion to clarify, no clarification is needed. Defendant-appellant is not entitled to a new trial on the retaliation issue, an issue on which plaintiff-appellee prevailed in the district court and on appeal. Moreover, as the majority opinion in this case makes clear, the

district court will determine on remand whether a new trial on the punitive damages issue only is necessary. If the district court determines that a new trial on punitive damages is appropriate, then it will also decide questions of admissibility of evidence at that trial, including to what extent evidence pertaining to retaliation should be admitted to permit the jury to decide whether or not plaintiff is entitled to punitive damages.

The motion to stay the mandate is granted, and the motion to issue the mandate is denied. The mandate will issue after 90 days from the entry of this order if no petition for certiorari is filed.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
LEONARD GREEN, Clerk